

No. 10035

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121
United States
Circuit Court of Appeals

admits to C
of Clerk.

For the Ninth Circuit.

THE B. F. GOODRICH COMPANY, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

MAY 11 1942

PAUL P. O'BRIEN,

United States
Circuit Court of Appeals

For the Ninth Circuit.

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Appellant,

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UNITED STATES OF AMERICA,

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Transcript of Record

Upon Appeal from the District Court of the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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Los Angeles, California.

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WILLIAM FLEET PALMER, Esq.,
United States Attorney,
ARMOND MONROE JEWELL, Esq.,
Assistant United States Attorney,
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Building,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division.

In Law No. 8138-M

THE B. F. GOODRICH COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION.

(Action for money had and received—For recovery of taxes erroneously collected)

Comes now plaintiff, The B. F. Goodrich Company, a corporation, and for its cause of action alleges:

I.

This action is brought against the United States of America as defendant for the reason that the person, namely John P. Carter, who was Collector of Internal Revenue at Los Angeles, California, for the Sixth District of California, at the time of payment under protest of the amounts for the recovery of which this action is brought, died prior to the commencement of this action and on or about the 24th day of April, 1935.

II.

Plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing

under and by virtue of the laws of the State of New York; that it is qualified to do business in the State of California, and has its principal office and place of business at Akron, Ohio, with an office in Los Angeles, California.

That defendant herein, the United States of America, now is and at all times mentioned herein was a body politic.

III.

That on June 30, 1934, plaintiff became owner of all the rights, claims and choses in action of every nature and description [2] which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter, under an assignment from the said Pacific Goodrich Rubber Company to the plaintiff, in which all of the assets above described were sold, transferred, assigned and set over to the plaintiff, all as is shown by copy of said assignment, a full, true and correct copy of which assignment hereinafter follows, is hereby referred to and made a part of this petition.

“ASSIGNMENT

Know All Men by These Presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good

and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To Have and to Hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any

proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In Witness Whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and Secretary as of the 30th day of June, 1934.

Attest:

S. M. JETT

Secretary.

PACIFIC GOODRICH
RUBBER COMPANY,

By J. D. TEW

President." [3]

IV.

That during his lifetime and during the time when the amounts herein paid were sought to be recovered, John P. Carter was the duly appointed

qualified and acting Collector of Internal Revenue for the Sixth District of California.

V.

That this is an action arising under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Section 202, 47 Stat. 261, as modified by the Act of August 12, 1933, Chapter 25, Section 9(a), 48 Stat. 35, and is for the recovery of a manufacturer's excise tax on rubber tires or casings erroneously and illegally collected from the Plaintiff by the Defendant.

VI.

That under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress), the plaintiff was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933, (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, i. e., \$0.044184 per pound; that under Section 9(a) of said Agricultural Adjustment Act, plaintiff was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932

by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax had been paid under Section 9(a) or Section 16(a) of the Agricultural Adjustment Act.

VII.

That said defendant and said Collector of Internal Revenue refused to permit plaintiff to take credit against excise [4] tax on articles processed wholly or in chief value from cotton in its inventory on August 1, 1933, despite the fact that the processing tax had theretofore been duly paid by the plaintiff upon cotton contained in such articles under Section 16(a) of the Agricultural Adjustment Act, and said defendant and said Collector of Internal Revenue erroneously and illegally demanded payment by plaintiff of \$..... with interest of \$....., and said defendant and said Collector of Internal Revenue erroneously collected from plaintiff, and the same was turned over to defendant, the sum of \$15,880.64 on or about April 17, 1934, and \$569.75 on or about July 27, 1934.

VIII.

That plaintiff, on or about the day of August, 1935, duly filed with Nat Rogan, successor of said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, in Los Angeles. its Claim for Refund of said tax and interest in the aggregate sum of \$16,450.39, paid by plaintiff on

April 17, 1934, and July 27, 1934, as set out above, together with interest thereon from the date of such erroneous payment to the date of the allowance of refund, and that the grounds set forth in said Claim for Refund were as follows:

“Under the provisions of this section, (9(a) of the Agricultural Adjustment Act), the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner’s construction of Section 9 of the Agricultural Adjustment Act to the effect that the taxpayer is not entitled to the credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.”

That a full, true and correct copy of said Claim hereinafter follows, is hereby referred to and by this reference is incorporated herein and made a part of this petition. [5]

AMENDED CLAIM

Form 843

Treasury Department
Internal Revenue Service

Revised June, 1930

To Be Filed with the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below
the kind of claim filed, and fill in the certificate on
the reverse side.

() Refund of Tax Illegally Collected.

() Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.

() Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of Ohio,

County of Summit—ss:

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—(Street) 5400 E. Ninth Street,
(City) Los Angeles, (State) Calif.

Residence.....

The deponent, being duly sworn according to
law, deposes and says that this statement is made
on behalf of the taxpayer named, and that the
facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.

2. Period (if for income tax, make separate form for each taxable year) from....., 19....., to....., 19.....

3. Character of assessment or tax—Excise tax.

4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$16,450.39 plus interest

7. Amount to be abated (not applicable to income or estate taxes) \$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of \$.044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act,

that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor-tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the

taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [6]

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing

that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [7]

That said Claim was rejected by the Commissioner of Internal Revenue under date of May 22, 1936, along with an amended claim, filed as hereinafter stated.

IX.

That plaintiff, on or about April, 1936, duly filed with Nat Rogan, the successor to said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, its amended Claim for Refund of said tax and interest, in the aggregate sum of \$16,450.39, paid by plaintiff as above set forth, and the grounds set forth in said Amended Claim were as follows:

“During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of \$.044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon

tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of the said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes

levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid."

That a full, true and correct copy of said Amended Claim hereinafter follows, is hereby referred to and is by reference incorporated herein and made a part hereof. [8]

CLAIM

Form 843

Treasury Department

Internal Revenue Service

Revised June, 1930

To be filed with the Collector where Assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

(x) Refund of tax illegally collected.

() Refund of amount paid for stamps unused,
or used in error or excess.

() Abatement of tax assessed (not applicable
to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of Taxpayer or purchaser of stamps The
B. F. Goodrich Company.

Business address 5400 E. Ninth Street,
(Street)

Los Angeles, California.

(City) (State)

Residence.....

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed
Los Angeles, California.

2. Period (if for income tax, make separate form
for each taxable year) from....., 19., to
....., 19..

3. Character of assessment or tax excise tax.

4. Amount of assessment, \$16,450.39; dates of
payment April 17; July 27, 1934.

5. Date stamps were purchased from the Govern-
ment.....

6. Amount to be refunded.....\$16,450.39
plus interest.

7. Amount to be abated (not applicable to income or estate taxes).....\$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company,

a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [9]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts

7. Amount to be abated (not applicable to income or estate taxes).....\$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company,

a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [9]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts

sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [10]

X.

That on or about May 25, 1936, plaintiff received from The Commissioner of Internal Revenue a notice dated May 22, 1936, that the said Amended Claim for Refund of said additional assessment and interest was rejected by the Commissioner of Internal Revenue on May 22, 1936, and neither said amount collected from plaintiff nor any part thereof has been repaid to the plaintiff.

XI.

That on August 1, 1933, the plaintiff held for sale or other disposition articles processed wholly or in chief value from cotton, to-wit, tire fabric, thread and other materials having a total cotton content of 784,177 pounds; that the plaintiff, according to law and the Regulations of the Secretary of the Treasury, promulgated in pursuance to said law, duly prepared and filed with said John P. Carter, Collector of Internal Revenue, its return and amended return showing said cotton content in detail, and paid to said Collector of Internal Revenue for defendant, and the same was paid and turned over to defendant by said Collector of Internal Revenue, a tax thereon at the rate of \$0.044184 per pound, which was the rate fixed by the Secretary of Agriculture in accordance with the provisions of the Agricultural Adjustment Act; that plaintiff paid to said Collector of Internal Revenue for defendant and the same was paid and turned

over to defendant under said return, the sum of \$34,648.08 in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,662.03

That despite the fact that the tax levied and collected was erroneously and illegally levied and collected, no part of the above named tax has been received by, refunded or credited to the plaintiff.

[117

XII.

That from August 1st through the 15th day of September, 1933, the plaintiff manufactured and sold tires which contained 757,260 pounds of the above mentioned 784, 177 pounds of articles processed wholly or in part from cotton and which was in plaintiff's inventory, and, on August 1, 1933, being held for sale or other disposition by the plaintiff, and upon which a tax at the rate of \$0.044184 per pound had been paid as above set forth.

XIII.

That for the months of August, September, October, November and December, 1933, the plaintiff filed with said John P. Carter, Collector of Internal Revenue, its manufacturers' excise tax returns in accordance with the law and regulations of the Secretary of the Treasury, and paid to said Col-

lector of Internal Revenue for and the same was paid and turned over to defendant, the taxes disclosed by said returns to be due and owing on the tires sold during said months, under the provisions of Section 602 of the Revenue Act of 1932; that the plaintiff computed the aforesaid taxes by deducting from the weight of the tires so sold the weight of the articles processed wholly or in chief value from cotton, contained therein, including in said deduction the above described 757,260 pounds of articles processed wholly or in chief value from cotton upon which a tax had theretofore been paid at the rate of \$0.044184 per pound as hereinbefore alleged. That on or about April 1934, the defendant and the said Collector of Internal Revenue for defendant assessed an additional manufacturer's excise tax against plaintiff for the months of November and December, 1933, in the sum of \$15,880.64, with interest in the sum of \$569.75, and that said additional assessment erroneously and illegally included an additional excise tax at the rate of $2\frac{1}{4}\text{c}$ per pound upon said 757,260 pounds of articles processed wholly or in chief value from cotton, which amount the plaintiff had [12] deducted from the weight of tires sold by it during the months of August and September, 1933, as above alleged.

XIV.

Upon demand by defendant and said John P. Carter, Collector of Internal Revenue, plaintiff on

April 17, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, the sum of \$15,880.64, and on July 27, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, interest according to the said demand in the sum of \$569.75; that said payments were made by the plaintiff under protest that such assessment was erroneous and illegal and was made solely to avoid interest and penalty, of which fact the defendant was duly advised at the time of said payments.

XV.

That at the time said additional tax was assessed, the defendant and the said John P. Carter, Collector of Internal Revenue, for convenience in arriving at the additional tax and interest which defendant and said Collector of Internal Revenue claimed to be due from plaintiff to defendant, determined that such assessment should be levied for the months of November and December; that the plaintiff did not object to this action if assessment were to be made, but did object to any additional assessment being made.

XVI.

That plaintiff has not included any of the tax which it herein seeks to recover in the price of the article with respect to which the said tax was imposed nor has it collected the amount of the said tax from the vendees of said article.

XVII.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of \$16,450.39, together with interest, after allowing all just credits and offsets. [13]

XVIII.

That plaintiff is and always has been the sole owner of the Claim herein referred to since June 30, 1934, and has not assigned or transferred said claim or any part thereof or any interest therein.

Wherefore, the plaintiff prays judgment against the defendant, United States of America, in the sum of \$16,450.39, with interest thereon at the rate of six per cent (6%) per annum, upon the sum of \$15,880.64 from April 17, 1934, and interest at said rate upon the sum of \$569.75 from July 27, 1934.

THE B. F. GOODRICH
COMPANY

By ANDREWS, BLANCHE
& KLINE,

And EUGENE H. BLANCHE
Its Attorneys

[Endorsed]: Filed Oct. 1, 1937. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy. [14]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAILING—
(PETITION)

State of California,
County of Los Angeles—ss.

Blanche Swan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 414 Union Oil Building, 617 West 7th Street, Los Angeles, California; that on the 5th day of October, 1937, affiant served the Petition on file in this action by placing a true copy thereof in an envelope addressed as follows: "Honorable Homer C. Cummings, United States Attorney General, Washington, D. C." and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, and that said envelope was mailed to said Homer C. Cummings by registered mail.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

BLANCHE SWAN

Subscribed and sworn to before me this 5th day of October, 1937.

[Seal] GRACE S. WILDERS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 6, 1937. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE—(PETITION)

State of California,
County of Los Angeles—ss.

Harry A. Mayhew, being first duly sworn, deposes and says:

I am and was on the date herein mentioned over the age of eighteen years and not a party to the above entitled action; that I personally served the Petition on file in said action by delivering to and leaving with the following named person, in the City of Los Angeles, County of Los Angeles, State of California, on the date set opposite his name, a true copy thereof, to-wit:

E. H. Mitchell, Assistant United States Attorney
October 4, 1937.

HARRY A. MAYHEW

Subscribed and sworn to before me this 4th day of October, 1937.

[Seal] GRACE S. WILDERS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 6, 1937. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. [16]

[Title of District Court and Cause.]

DEMURRER

Comes Now the defendant, United States of America, by Ben Harrison as United States Attorney in and for the Southern District of California, and Francis C. Whelan, Assistant United States Attorney for said District, its attorneys, and respectfully demurs to plaintiff's Petition filed herein, and for grounds for said demurrer says:

1. On June 16, 1936, there was enacted by Congress the Revenue Act of 1936 (H. R. 12395, Public No. 740, 74th Cong., Title 7, U. S. C. A. § 644 et seq.) which was signed by the President of the United States and became effective on June 22, 1936, under the provisions of which this Court is now without jurisdiction of the matters and things of which plaintiff complains, and to render judgment in favor of plaintiff and against defendant herein for that:

(a) Congress by Section 903 of said Revenue Act of 1936 has made the filing of a claim for refund by plaintiff with the Commissioner of Internal Revenue after June 22, 1936, and prior to July 1, 1937, setting forth clearly under oath all the evidence relied upon in support of said claim, a condition precedent to the maintenance of this suit in the absence of which this Court is without jurisdiction to entertain this suit.

(b) Congress by Section 904 of said Revenue [17] Act of 1936 has provided that (except as to processing taxes as defined in the Act of 1936 as hereinafter more particularly set forth) no suit or proceeding whether brought before or after June 22, 1936, for the recovery, recoupment, set-off, refund or credit, or counter-claim, of any amount paid by or collected from any person as a tax under the Agricultural Adjustment Act shall be maintained in any Court if brought before the expiration of eighteen months from the date of the filing of the claim for refund required to be filed by Section 903 of the Act, unless the Commissioner renders a decision thereon within that time, or after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant, notice of disallowance of that part of the claim to which such suit or proceeding relates.

The effect of said Section 904 (Title 7 U. S. C. A. § 646) is to deprive this Court of jurisdiction to herein determine this suit, since it affirmatively appears from the face of the Petition that no such decision by the Commissioner of Internal Revenue or no such claim has or have been made.

(c) Congress by Sections 905 and 906 (Title 7 U. S. C. A., §§ 647 and 648) of said Revenue Act of 1936 has deprived this Court of Jurisdiction to hear and determine the matters set forth in plaintiff's Petition covering the amounts paid or collected from plaintiff as processing taxes under the Agricultural Adjustment Act.

(d) Congress by Section 906 of said Revenue Act of 1936 has conferred exclusive jurisdiction to hear and determine the matters set forth in [18] plaintiff's Petition covering the amounts paid or collected as processing taxes from plaintiff under the Agricultural Adjustment Act upon a Board of Review established pursuant to subdivision (b) thereof subject to review on petition filed by plaintiff or the Commissioner of Internal Revenue as provided in subdivision (g) of said Section 906 by the Circuit Court of Appeals of the United States where the claimant resides, or by agreement of plaintiff and the Commissioner of Internal Revenue in the United States Court of Appeals for the District of Columbia.

2. Plaintiff's said Petition does not state facts sufficient to constitute a cause of action against this defendant for the following reasons:

(a) It affirmatively appears from the allegations of plaintiff's Petition that plaintiff has not complied with the provisions laid down by Congress in Sections 902, 903 ,904 and 906, respectively, and each subdivision thereof, respectively, of the Revenue Act, of 1936, each of which sections and subdivisions thereof is hereby by reference adopted and made part hereof as if specifically herein set forth.

(b) Plaintiff's said Petition does not state any facts which would warrant a judgment by this Court, against this defendant and in favor of plaintiff.

BEN HARRISON

United States Attorney

FRANCIS C. WHELAN

Assistant U. S. Attorney

Attorneys for

Defendant.

[Endorsed]: Filed Dec. 3, 1937. [19]

POINTS AND AUTHORITIES
IN SUPPORT OF DEMURRER.

I.

This Court is without jurisdiction to entertain this action in so far as it relates to the recovery of amounts paid as processing taxes. Section 906, Revenue Act of 1936 (hereto appended).

II.

The withdrawal from the District Courts of jurisdiction to entertain suits for recovery of amounts paid as processing taxes has deprived plaintiff of no constitutional rights.

Anniston Mfg. Co. v. Davis, 301 U. S. 337.

III.

This Court is without jurisdiction to pass upon plaintiff's claim for refund of floor stocks taxes.

A. Section 903 of the Revenue Act provides that unless certain procedural steps are taken by claimant, no refund of amounts paid as taxes shall be allowed and no suit shall be brought or maintained for recovery of any amount paid as a tax.

B. The requirements have not been complied with by plaintiff, and its suit is premature.

C. Conditions precedent to the right to sue the United States are validly imposed.

Anniston Mfg. Co. v. Davis, *supra*.

D. Compliance with conditions precedent must be alleged.

Amson v. Murphy, 115 U. S. 579, 584, 586.

1. Compliance with conditions precedent of Sections 903 and 904 of the Revenue Act have not been alleged.

2. Elements required by Section 902 of the Act have not been alleged.

[Endorsed]: Filed Dec. 3, 1937. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [20]

[Title of District Court and Cause.]

AMENDMENT TO DEMURRER.

Comes now the defendant United States of America, by Ben Harrison, United States Attorney for the Southern District of California, and Francis C. Whelan, Assistant United States Attorney for the Southern District of California, and respectfully moves the following amendment to defendant's demurrer already on file, on the following grounds:

3. That it does not appear from the bill of complaint on file herein that a valid assignment has been made of the subject matter of the claim alleged in said bill by the Pacific Goodrich Rubber Company to complainant

herein, as required by Section 203, Title 31 U. S. Code; and that it affirmatively appears from the face of said bill of complaint that plaintiff does not rely upon a valid assignment of the claim alleged in plaintiff's bill of complaint as required by said Title 31, Section 203 U. S. Code; and that plaintiff's bill of complaint does not state a cause of action against this defendant for such reason.

Wherefore, defendant prays that plaintiff's bill of complaint be dismissed for the grounds set forth in defendant's demurrer already on file and in this amendment to demurrer.

Respectfully submitted,

BEN HARRISON,

United States Attorney,

FRANCIS C. WHELAN,

Assistant U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Apr. 6, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [21]

[Title of District Court and Cause.]

AMENDMENT TO PETITION

Pursuant to court Order dated May 21, 1938, plaintiff The B. F. Goodrich Company, a corporation, amends its petition on file herein by adding to paragraph III at the end thereof the following allegation:

In addition to the foregoing assignment and as a supplement thereof, there was executed by Pacific Goodrich Rubber Company, on the 14th day of August, 1935, a further document assigning unto The B. F. Goodrich Company all the rights, claims and choses in action of every nature and description which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or should later accrue, all as shown by a copy of said document, a full, true and correct copy of which hereinafter follows, and is hereby referred to and made a part of the amended petition:

“For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government

from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found [22] to be due, together with interest thereon.

The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and particularly, said claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

In Witness Whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

PACIFIC GOODRICH RUBBER
COMPANY,

(Seal) By J. D. TEW,
President.

By S. M. JETT,
Secretary.

F. C. LESLIE
F. M. SEIFERT

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said County, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said the Pacific Goodrich Rubber Company.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 14th day of August, 1935.

ALBERTA M. TEWERS,

Notary Public.

My Commission expires Dec. 15, 1935."

(Seal) [23]

That in all other particulars said petition shall be and remain in the form as on file herein.

Dated: May 21st, 1938.

THE B. F. GOODRICH COMPANY,
By: ANDREWS, BLANCHE & KLINE
and EUGENE H. BLANCHE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 21, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy. [24]

[Title of District Court and Cause.]

ORDER

For good cause shown, It Is Hereby Ordered that the petition on file in the above entitled action shall be amended in the particulars as set forth in the hereunto attached Amendment to Petition.

Dated: May 21, 1938.

WM. P. JAMES,
Judge.

[Endorsed]: Filed May 21, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy. [25]

[Title of District Court and Cause.]

SECOND
AMENDMENT TO DEMURRER

Comes Now the defendant, United States of America, by its attorneys Ben Harrison, United States Attorney, and Francis C. Whelan, Asst. United States Attorney, and moves this amendment to its demurrer now on file herein.

I.

Defendant hereby demurs to plaintiff's complaint, as amended, upon the grounds and reasons heretofore set forth in defendant's Demurrer, as already amended on file herein, and by reference incorporates all of the same herein.

BEN HARRISON,

United States Attorney.

FRANCIS C. WHELAN,

Asst. United States Attorney,
Attorneys for defendant.

Received copy of above document. Andrews Blanche & Kline. By H. A. Mayhew.

[Endorsed]: Filed Aug. 1, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER
SUSTAINING DEMURRER.

To: The B. F. Goodrich Company, a corporation;
and

To: Andrews, Blanche & Kline and Eugene H.
Blanche, its attorneys:

You, and each of you, will please take notice that the defendant United States of America will move the above entitled court on the 3rd day of October, 1928, at 10 o'clock A. M., before the Honorable Paul J. McCormick, United States District Judge, in Room 588 Pacific Electric Building, Los Angeles, California, for its order sustaining defendant's Demurrer to plaintiff's Bill of Complaint herein.

Dated: August 8, 1938.

UNITED STATES OF AMERICA,
By BEN HARRISON,
United States Attorney,
FRANCIS C. WHELAN,
Asst. United States Attorney.

[Endorsed]: Filed Aug. 9, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [27]

At a stated term, to-wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central

Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of October in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for hearing on demurrer; F. C. Whelan, Assistant U. S. Attorney, appearing for the Government; F. C. Leslie, Esq., appearing for the plaintiff:

Attorney Whelan makes a statement in support of the said demurrer, and Attorney Leslie makes a statement in opposition.

It is, thereupon, ordered that the demurrer be, and it is, overruled, and thirty (30) days are allowed in which to answer. [28]

[Title of District Court and Cause.]

ANSWER

Comes now defendant, United States of America, and for answer to plaintiff's petition, as amended, denies, admits and alleges as follows:

First Answer and Defense.

I.

Answering paragraph III of said petition as amended this defendant does not have sufficient

information or belief to enable it to answer the allegations of said paragraph and therefore, basing its denial upon that ground, denies each and every allegation of said paragraph III as amended.

II.

Answering paragraph V of said petition this answering defendant denies that this is an action for recovery of a manufacturer's excise tax on rubber tires or casings erroneously or illegally collected from the plaintiff by the defendant, and alleges that this action is in fact an action for the recovery of floor stock taxes collected from the plaintiff by the defendant under the provisions of the Agricultural Adjustment Act, (Act of May 12, 1933; Title 7 U. S. C. Sec. 616).

III.

Answering the allegations of paragraph VI of said petition, this answering defendant denies that plaintiff was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the [29] Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires unless said cotton had been processed after August 1, 1933.

Further answering the allegations of said paragraph VI this defendant alleges that under the provisions of Title 7 U. S. C. Sec 609, Act of May 12, 1933, commonly known as the Agricultural Adjustment Act, it was provided that upon any article upon which a manufacturer's sale tax is levied

under the authority of Chapter 20 of Title 26, and which manufacturer's sales tax is computed on the basis of weight, such manufacturer's sales tax shall be computed on the basis of the weight of said mentioned article less the weight of the processed cotton therein on which a processing tax has been paid; this defendant further alleges that neither plaintiff nor plaintiff's assignor paid any processing tax upon the cotton referred to in plaintiff's complaint and defendant alleges that any sums paid under the Agricultural Adjustment Act respecting said cotton by plaintiff or plaintiff's assignor were paid as floor stock taxes and that there is no provision in said Agricultural Adjustment Act or otherwise allowing for a deduction from any amounts due as tax under the authority of Chapter 20 of Title 26 United States Code, on account of the payment of any floor stock taxes paid under the Agricultural Adjustment Act.

IV.

Answering paragraph VII of said petition this defendant denies that this defendant and/or the Collector of Internal Revenue erroneously and/or illegally demanded payment by plaintiff of any sum or sums, and denies that said defendant and/or said Collector of Internal Revenue erroneously collected from plaintiff any sum or sums; and denies that a processing tax within the meaning of Title 7, U. S. C. Sec. 609 had been paid upon said cotton referred to in said paragraph VII. [30]

V.

Answering paragraph XI of said petition this defendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph as to the amount of tire fabric, thread and/or other materials processed wholly or in chief value from cotton and held by plaintiff for sale on August 1, 1933; therefore, basing its denial upon that ground defendant denies each and every allegation pertaining to the amount of such materials held for sale or other disposition by plaintiff on August 1, 1933; further answering the allegations of said paragraph this defendant denies that any tax levied and/or collected against or from plaintiff under the provisions of the Revenue Act of June 6, 1932, Chapter 209, Section 202; 47 Stat. 261, as modified by the Act of May 12, 1933, Chapter 25, Section 9(a); 48 Stat. 35, Title 7 U. S. C. 609(a), was erroneously and/or illegally levied and/or collected.

VI.

Answering the allegations of paragraph XII of said petition, this answering defendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph not hereinbefore admitted and therefore, basing its denial on that ground, denies each and every allegation of said paragraph not hereinbefore admitted.

VII.

Answering paragraph XIII of said petition this defendant denies that plaintiff filed with the Col-

lector of Internal Revenue therein referred to, for the periods therein referred to, its manufacturer's excise tax returns in accordance with the law and/or regulations of the Secretary of the Treasury; and this defendant denies that the alleged assessment assessed against plaintiff was erroneously and/or illegally made.

VIII.

Answering the allegations of paragraph XVI, this answering de- [31] fendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph and therefore, basing its denial upon that ground, denies each and every allegation of said paragraph.

IX.

Answering the allegations of paragraph XVII of said petition, this defendant denies each and every allegation thereof.

X.

Answering the allegations of paragraph XVIII of said petition, this defendant denies each and every allegation thereof, upon the ground that it does not have sufficient information or belief to enable it to answer the same.

Second Answer and Defense.

For further and affirmative answer and defense, this defendant alleges as follows:

I.

Defendant alleges that this action is in fact one for the recovery of floor stock taxes alleged to have

been levied by the defendant under the provisions of Title 7, U. S. C. Sec. 616, Act of May 12, 1933, Chap. 25, Title 1, Sec. 16, upon certain stocks of processed cotton held for sale or other disposition by Pacific Goodrich Rubber Company, a corporation, on August 1, 1933; that said Act has been held unconstitutional and invalid and that certain procedural steps have been enacted by the Congress of the United States regarding the refund of any moneys paid as taxes under said unconstitutional act, which said act is commonly known as the Agricultural Adjustment Act.

II.

That it is provided by the provisions of the Revenue Act of 1936, Chap. 690, for the procedure required to be taken for refund of any moneys collected under said Agricultural Adjustment Acts that under the provisions of said Revenue Act, Title 7, U. S. C. Sec. 645, it is provided that no refund of any amount paid by or collected from any [32] person as taxes under said Agricultural Adjustment Act shall be made or allowed unless after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by said person in accordance with regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. It is further provided by Title 7 U. S. C. Sec. 646, that no suit or proceeding shall be brought or maintained in any court for the recovery of any moneys paid under said Agricultural Adjustment Act before the ex-

piration of eighteen (18) months from the date of filing a claim therefor under Section 645 of Title 7, U. S. C., unless the Commissioner renders a decision thereon within that time or after the expiration of two years from the date of mailing to claimant by the Commissioner a notice of disallowance of that part of the claim to which said suit or proceeding relates.

It is further provided by Section 644 of Title 7, U. S. C. that no refund shall be made or allowed of any amount paid under the provisions of the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of said Commissioner of Internal Revenue that the claimant bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor nor shifted such burden directly or indirectly.

III.

That neither plaintiff nor its alleged assignor herein have filed a claim for refund of said floor stock taxes within the time prescribed by law as aforesaid; that the provisions of said Revenue Act of 1936 relative to the time for filing suit for refund of floor stock taxes have not been complied with herein. Further, this defendant is informed and believes, and therefore alleges, that neither plaintiff nor plaintiff's assignor has borne the burden of such amount now sought to be recovered as required by the aforesaid provisions of the law relating to refunds of moneys paid under the Agricultural Adjustment Act. [33]

This defendant is informed and believes, and therefore alleges that this action is claimed to have been brought under the provisions of the Revenue Act of 1932 in order to evade the requirements of the law relating to the maintenance of suits for recovery of moneys paid under the Agricultural Adjustment Act as set forth in the Revenue Act of 1936.

IV.

This defendant alleges that any deduction attempted to be claimed by plaintiff from amounts taxable under the Revenue Act of 1932 by virtue of the provisions of the said Agricultural Adjustment Act are invalid for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect.

Wherefore, defendant prays that plaintiff take nothing by its complaint and that defendant have its costs of suit and such other and further relief as to the court may seem just and equitable.

BEN HARRISON,

United States Attorney.

FRANCIS C. WHELAN,

Assistant United States
Attorney.

Attorneys for United States
of America.

[Endorsed]: Filed Feb. 3, 1939. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy. [34]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

United States of America,
Southern District of California—ss.

Frances E. Barragar, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 376 Pacific Elec. Bldg., Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on Feb. 3, 1939 she deposited in the United States Mails in a mail depository at Union and "F" Streets, San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Answer addressed to Andrews, Blanche & Kline, Attorneys at Law, Union Oil Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

FRANCES E. BARRAGER

Subscribed and Sworn to before me, this 3d day of February, 1939.

R. S. ZIMMERMAN,
Clerk, U. S. District Court.
Southern District of
California.

By FRANCIS E. CROSS,
(Court Seal) Deputy.

[Endorsed]: Filed Feb. 3, 1939. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk. [35]

[Title of District Court and Cause.]

FIRST AMENDED PETITION

(Action for Money had and Received—For
Recovery of Taxes Erroneously Collected)

Comes now plaintiff, The B. F. Goodrich Company, a corporation, and for its cause of action alleges:

I.

This action is brought against the United States of America as defendant for the reason that the person, namely, John P. Carter, who was Collector of Internal Revenue at Los Angeles, California, for the Sixth District of California, at the time of payment under protest of the amounts for the recovery of which this action is brought, died prior to the commencement of this action and on or about the 24th day of April, 1935.

II.

Plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York; that it is qualified to do business in the State of California, and has its principal office and place of business at Akron, Ohio, with an office in Los Angeles, California.

That defendant herein, the United States of America, now is and at all times mentioned herein was a body politic. [36]

III.

That on June 30, 1934, and at all times prior thereto and subsequent thereto, plaintiff was the sole shareholder of Pacific Goodrich Rubber Company and the sole owner of all of the issued and outstanding capital stock of Pacific Goodrich Rubber Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and that at no time prior to said date or thereon or at any time subsequent thereto were any of the shares of the capital stock of said Pacific Goodrich Rubber Company subscribed for but unissued.

That on said 30th day of June, 1934, plaintiff, as the sole shareholder of Pacific Goodrich Rubber Company and as the sole owner of all of the issued and outstanding shares of the capital stock of said Pacific Goodrich Rubber Company, became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with the title to all the rights, claims and choses in action of every nature and description, which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due or payable.

That as physical evidence, affirmative proof and in confirmation of the above and foregoing, an assignment was executed by Pacific Goodrich Rubber Company and delivered by it to plaintiff, all on or about June 30, 1934; that by the terms and pro-

visions of said assignment all of the assets above described, mentioned or referred to, were sold, transferred, assigned, and set over to plaintiff, all as is shown by said assignment, a full, true and correct copy of said assignment hereafter follows, is hereby referred to and made a part of this petition: [37]

“ASSIGNMENT

“Know All Men by these Presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

“To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

“Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

“And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

“In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and

Secretary as of the 30th day of June, 1934.

PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW
President"

"Attest:

S. M. JETT
Secretary"

In addition to the foregoing assignment and as a supplement thereof, there was executed by Pacific Goodrich Rubber Company, on the 14th day of August, 1935, a further document assigning unto The B. F. Goodrich Company all the rights, claims and choses in [38] action of every nature and description which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or should later accrue, all as shown by said document, a full, true and correct copy of which hereinafter follows, and is hereby referred to and made a part of this First Amended Petition:

"For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax ille-

gally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon.

“The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and particularly, such claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

“In witness whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

(Seal) PACIFIC GOODRICH RUBBER
 COMPANY

By J. D. TEW

President

By S. M. JETT

Secretary

F. C. LESLIE

F. M. SEIFERT

“State of Ohio,
County of Summit—ss.

“Before me, a Notary Public in and for said County, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal [39] affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said The Pacific Goodrich Rubber Company.

“In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 14th day of August, 1935.

(Seal)

ALBERTA M. TEWERS

Notary Public

My Commission expires Dec. 15, 1935.”

IV.

That during his lifetime and during the time when the amounts herein paid were sought to be recovered, John P. Carter was the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California.

V.

That this is an action arising under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Section 202, 47 Stat. 261, as modified by the Act of August 12, 1933, Chapter 25, Section 9 (a), 48 Stat. 35, and is for the recovery of a manufacturer's excise tax on rubber tires or casings erroneously and illegally collected from the plaintiff by the defendant.

VI.

That under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress), plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933, (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), [40] in an amount equivalent to the tax which would have been paid on said cotton had it actually been purchased after August 1, 1933, i.e., \$0.044184 per pound; that under Section 9(a) of said Agricultural Adjustment Act, plaintiff's said predecessor in interest was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax had been paid

under Section 9 (a) or Section 16 (a) of the Agricultural Adjustment Act.

VII.

That said defendant and said Collector of Internal Revenue refused to permit plaintiff's said predecessor in interest to take credit against excise tax on articles processed wholly or in chief value from cotton in its inventory on August 1, 1933, despite the fact that the processing tax had theretofore been duly paid by the plaintiff's said predecessor in interest upon cotton contained in such articles under Section 16 (a) of the Agricultural Adjustment Act, and said defendant and said Collector of Internal Revenue erroneously and illegally demanded payment by plaintiff's said predecessor in interest of \$..... with interest of \$....., and said defendant and said Collector of Internal Revenue erroneously collected from plaintiff's said predecessor in interest, and the same was turned over to defendant, the sum of \$15,880.64 on or about April 18, 1934, and \$569.75 on or about July 27, 1934.

VIII.

That plaintiff, on or about August, 1935, duly filed with Nat Rogan, successor of said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, in Los Angeles, its Claim for Refund of said tax and interest in the aggregate sum of \$16,450.39, paid by plaintiff's [41] said predecessor in interest on April 17, 1934, and July 27, 1934, as set out

above, together with interest thereon from the date of such erroneous payment to the date of the allowance of refund, and that the grounds set forth in said Claim for Refund were as follows:

“Under the provisions of this section, (9 (a) of the Agricultural Adjustment Act), the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner’s construction of Section 9 of the Agricultural Adjustment Act to the effect that the taxpayer is not entitled to the credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.”

That a full, true and correct copy of said Claim hereinafter follows, is hereby referred to and by this reference is incorporated herein and made a part of this First Amended Petition. [42]

Form 843

Treasury Department
Internal Revenue Service
Revised June, 1930

CLAIM

To be filed with the Collector where assessment was
made or tax paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

- [x] Refund of tax illegally collected.
- [] Refund of amount paid for stamps unused, or
used in error or excess.
- [] Abatement of tax assessed (not applicable to
estate or income taxes).

State of Ohio,
County of Summit—ss.

Name of taxpayer or purchaser of stamps The B. F.
Goodrich Company
Business Address 5400 E. Ninth Street, Los Angeles,
California

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed Los
Angeles, California
2. Period (if for income tax, make separate form

for each taxable year) from, 19.....
to, 19.....

3. Character of assessment or tax excise tax
4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus
7. Amount to be abated (not applicable to income or estate taxes) \$ interest
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H.R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a

proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [43]

(Signed) THE B. F. GOODRICH
COMPANY

By.....

Sworn to and subscribed before me this
day of, 193.....

.....
(Signature of officer administering oath)

.....
(Title)

(See Instructions on reverse side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

.....
Collector of Internal Revenue

.....
(District)

Committee on Claims

Amount claimed.....\$.....
Amount allowed\$.....
Amount rejected\$.....

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [44]

That said Claim was rejected by the Commissioner of Internal Revenue under date of May 22, 1936, along with an amended claim, filed as hereinafter stated.

IX.

That plaintiff, on or about April 10, 1936, duly filed with Nat Rogan, the successor to said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, its amended Claim for Refund of said tax and interest, in the aggregate sum of \$16,450.39, paid by plaintiff's said predecessor in interest as

above set forth, and the grounds set forth in said Amended Claim were as follows:

“During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not [45] apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of the said Act. The taxpayer did not include

the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitled the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words 'processing tax' as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that 'processing taxes' as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid."

That a full, true and correct copy of said Amended Claim hereinafter follows, is hereby referred to and is by reference incorporated herein and made a part hereof. [46]

Form 843

Treasury Department
Internal Revenue Service

Revised June, 1930

AMENDED CLAIM TO BE FILED WITH THE
COLLECTOR WHERE ASSESSMENT WAS
MADE OR TAX PAID.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

—Refund of Tax Illegally Collected.

—Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

—Abatement of Tax Assessed. (not applicable to estate or income taxes).

State of Ohio,
County of Summit—ss.

Name of taxpayer or purchaser of stamps—The B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, Calif.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.

2. Period (if for income tax, make separate form

for each taxable year) from.....19....., to....., 19.....

3. Character of assessment or tax—Excise tax.

4. Amount of assessment, \$16,450.39; dates of payment—April 17, July 27, 1934.

5. Date stamps were purchased from the Government—

6. Amount to be refunded—\$16,450.39 plus interest.

7. Amount to be abated (not applicable to income or estate taxes)—\$

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933 taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight

of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires, upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitled the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit

granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [47]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the

following facts as to the purchase of stamps:

[Form not filled in]

Collector of Internal Revenue

(District)

Amount claimed\$.....

Amount allowed\$.....

Amount rejected\$.....

Committee on Claims

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administra-

tor, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [48]

X.

That on or about May 25, 1936, plaintiff received from the Commissioner of Internal Revenue a notice dated May 22, 1936, that the said Amended Claim for Refund of said additional assessment and interest was rejected by the Commissioner of Internal Revenue on May 22, 1936, and neither said amount collected from plaintiff's said predecessor in interest nor any part thereof has been repaid to plaintiff's said predecessor in interest or to plaintiff.

XI.

That on August 1, 1933, the plaintiff's said predecessor in interest held for sale or other disposition articles processed wholly or in chief value from cotton, to-wit, tire fabric, thread and other materials having a total cotton content of 782,474

pounds; that plaintiff's said predecessor in interest, according to law and the Regulations of the Secretary of the Treasury, promulgated in pursuance to said law, duly prepared and filed with said John P. Carter, Collector of Internal Revenue, its return and amended return showing said cotton content in detail, and paid to said Collector of Internal Revenue for defendant, and the same was paid and turned over to defendant by said Collector of Internal Revenue, a tax thereon at the rate of \$0.044184 per pound, which was the rate fixed by the Secretary of Agriculture in accordance with the provisions of the Agricultural Adjustment Act; that plaintiff's said predecessor in interest paid to said Collector of Internal Revenue for defendant and the same was paid and turned over to defendant under said return, the sum of \$34,648.08 in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,662.03

That despite the fact that the tax levied and collected was [49] erroneously and illegally levied and collected, no part of the above named tax has been received by, refunded or credited to the plaintiff or to plaintiff's said predecessor in interest.

XII.

That from August 1st through the 15th day of

September, 1933, plaintiff's said predecessor in interest manufactured and sold tires which contained 705,806 pounds of the above mentioned 782,474 pounds of articles processed wholly or in part from cotton and which was in the inventory of plaintiff's said predecessor in interest, and, on August 1, 1933, being held for sale or other disposition by said plaintiff's predecessor in interest and upon which a tax at the rate of \$0.044184 per pound had been paid as above set forth.

XIII.

That for the months of August, September, October, November and December, 1933, plaintiff's said predecessor in interest filed with said John P. Carter, Collector of Internal Revenue, its manufacturers' excise tax returns in accordance with the law and regulations of the Secretary of the Treasury, and paid to said Collector of Internal Revenue for and the same was paid and turned over to defendant, the taxes disclosed by said returns to be due and owing on the tires sold during said months, under the provisions of Section 602 of the Revenue Act of 1932; that said plaintiff's predecessor in interest computed the aforesaid taxes by deducting from the weight of the tires so sold the weight of the articles processed wholly or in chief value from cotton, contained therein, including in said deduction the above described 757,260 pounds of articles processed wholly or in chief value from cotton

upon which a tax had theretofore been paid at the rate of \$0.044184 per pound as hereinbefore alleged. That on or about April 10, 1934, the defendant and the said Collector of Internal Revenue for defendant assessed an additional manu- [50] facturer's excise tax against plaintiff's said predecessor in interest for the months of November and December, 1933, and in the sum of \$15,880.64, with interest in the sum of \$569.75, and that said additional assessment erroneously and illegally included an additional excise tax at the rate of $2\frac{1}{4}\text{¢}$ per pound upon said 705,806 pounds of articles processed wholly or in chief value from cotton, which amount plaintiff's said predecessor in interest had deducted from the weight of tires sold by it during the months of August and September, 1933, as above alleged.

XIV.

Upon demand by defendant and said John P. Carter, Collector of Internal Revenue, plaintiff's said predecessor in interest on April 17, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, the sum of \$15,880.64, and on July 27, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, interest according to the said demand in the sum of \$569.75; that said payments were made by plaintiff's said predecessor in interest under protest that such assessment was erroneous and illegal and was

made solely to avoid interest and penalty, of which fact the defendant was duly advised at the time of said payments.

XV.

That at the time said additional tax was assessed, the defendant and the said John P. Carter, Collector of Internal Revenue, for convenience in arriving at the additional tax and interest which defendant and said Collector of Internal Revenue claimed to be due from plaintiff's said predecessor in interest to defendant, determined that such assessment should be levied for the months of November and December; that plaintiff's said predecessor in interest did not object to this action if assessment were to be made, but did object to any additional assessment being made. [51]

XVI.

That plaintiff's said predecessor in interest did not and has not included any of the tax which plaintiff herein seeks to recover in the price of the article with respect to which the said tax was imposed nor did plaintiff's said predecessor in interest collect the amount of the said tax or any thereof from the vendees of said article.

XVII.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of \$16,450.39, together with interest, after allowing all just credits and offsets.

XVIII.

That plaintiff is and always has been the sole owner of the claims herein referred to since June 30, 1934, and has not assigned, transferred or otherwise disposed of said claims or any thereof or any part thereof or any interest therein.

Wherefore, the plaintiff prays judgment against the defendant, United States of America, in the sum of \$16,450.39, with interest thereon at the rate of six per cent (6%) per annum, upon the sum of \$15,880.64 from April 18, 1934, and interest at said rate upon the sum of \$569.75 from July 27, 1934.

THE B. F. GOODRICH COMPANY

By EUGENE H. BLANCHE

Its Attorney [52]

State of California,
County of Los Angeles—ss.

J. C. Herbert, being by me first duly sworn, deposes and says: That he is Assistant Secretary of The B. F. Goodrich Company, the petitioner in the above entitled action; that he makes this affidavit for and on behalf of said The B. F. Goodrich Company; that he has read the foregoing First Amended Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. C. HERBERT

Subscribed and sworn to before me this 2nd day of February, 1940.

(Seal)

ETHEL HICKEY

Notary Public in and for said County of
Los Angeles, State of California

[Endorsed]: Filed Feb. 5, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy. [53]

[Title of District Court and Cause.]

STIPULATION

(1—As to filing First Amended Petition by Plaintiff; 2—That Answer of Defendant to Petition as amended be Answer to First Amended Petition)

It is hereby stipulated by and between the above named plaintiff, The B. F. Goodrich Company, and the above named defendant, United States of America, by and through their respective counsel, as follows:

(a) That the petition and the amendment to the petition on file in the above entitled action may be amended in the particulars as set forth in plaintiff's First Amended Petition presented herewith:

(b) That defendant's Answer heretofore filed herein to plaintiff's Petition as amended shall in all particulars be deemed to be and shall be an Answer to plaintiff's First Amended Petition in all particulars and with the same force and effect and

to the same extent as though said Answer was specific and particular answer to said First Amended Petition.

Dated: February 2, 1940.

EUGENE H. BLANCHE

Attorney for Plaintiff

BEN HARRISON,

United States Attorney

By ARMOND MONROE JEWELL

Assistant United States Attorney

Attorneys for Defendant

It is so ordered, this Feb. 5, 1940.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Feb. 5, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [54]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The undersigned does hereby substitute Eugene H. Blanche in the place and stead of the firm of Andrews, Blanche & Kline as its attorney in the above entitled matter.

Dated this 20th day of October, 1939.

THE B. F. GOODRICH COMPANY

By J. C. HERBERT

Ass't Sec'y

We hereby consent to the foregoing substitution this 2...th day of October, 1939.

ANDREWS, BLANCHE & KLINE

By L. W. ANDREWS

I hereby accept the foregoing substitution this 26th day of October, 1939.

EUGENE H. BLANCHE

[Endorsed]: Filed Feb. 10, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [55]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The tax sought to be recovered in the above entitled action was paid to John P. Carter, the Collector of Internal Revenue, at Los Angeles, California, for the Sixth District of California. The said John P. Carter died prior the commencement of this action, namely, on or about the 24th day of April, 1935. Nat Rogan succeeded the said John P. Carter, deceased, as Collector of Internal Revenue,

for the Sixth District of California, and still holds that position.

2. The plaintiff herein is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business at Akron, Ohio; that it is qualified to do business in the State of California and has an office at Los Angeles, California.

The defendant, United States of America now is and at all times mentioned in the First Amended Petition herein and in this stipulation was a body politic. [56]

3. That if J. C. Herbert was called as a witness and sworn in the hearing and trial of the above entitled matter, he would testify as follows:

That on June 20, 1927, Pacific Goodrich Rubber Company was incorporated under the laws of the State of Delaware.

That said corporation was dissolved on or about December 21, 1934.

That from on or about March 1, 1928 to on or about June 30, 1934, he, the said J. C. Herbert was an officer of, to wit, Secretary of said Pacific Goodrich Rubber Company, and that from on or about June 30, 1934, to December 21, 1934, he was Vice President of said corporation; that as such he had charge of the corporate books and records of said corporation.

That on June 30, 1934, 8000 shares of the capital stock of said Pacific Goodrich Rubber Company were issued and outstanding, and that none of the shares of said stock were subscribed for but unissued; that at all times on and after June 30, 1934, the number of shares of stock of said Pacific Goodrich Rubber Company which were issued and outstanding remained unchanged; that at no time on or after June, 1934, were any of said shares subscribed for but unissued; that the books, records and accounts of Pacific Goodrich Rubber Company disclosed at all times from the time of the first issuance of stock up to and including the date of its disincorporation that all stock issued by Pacific Goodrich Rubber Company was issued in the name of The B. F. Goodrich Company, a corporation, or to Trustees for its benefit as the actual owner thereof.

That he, the said J. C. Herbert, was on June 30, 1934, and ever since said date has been and now is an officer of The B. F. Goodrich Company, a corporation, to wit, the Ass't Secretary of said corporation, and as such is familiar with the assets and affairs of such Company, and that on June 30, [57] 1934, and at all times thereafter up to and including December 21, 1934, The B. F. Goodrich Company was the owner of 8,000 shares of capital stock of Pacific Goodrich Rubber Company.

That he, the said J. C. Herbert, as said officer of Pacific Goodrich Rubber Company, and as officer of The B. F. Goodrich Company, knows that the original assignment dated June 30, 1934, copy of which is particularly set forth in lines 1 to 28, inclusive, of page 3 of the First Amended Petition in the above entitled matter, was executed by Pacific Goodrich Rubber Company to and in favor of The B. F. Goodrich Company and was by said Pacific Goodrich Rubber Company delivered to the said The B. F. Goodrich Company, and that the original of the assignment, dated August 14, 1935, copy of which is set forth in lines 7 to 32 of page 4, and lines 1 to 10 of page 5, of the First Amended Petition in the above entitled action was executed by Pacific Goodrich Rubber Company to and in favor of The B. F. Goodrich Company and was delivered by Pacific Goodrich Rubber Company to the said The B. F. Goodrich Company.

That full, true and correct copies of said assignments of June 30, 1934 and of August 14, 1935 are filed herein as plaintiff's Exhibits "A" and "B" respectively; said copies having by stipulation the same force and effect as though the original assignments were so filed.

4. That if George Hubbell were called as a witness and sworn at the hearing and trial of the above entitled matter, he would testify as follows:

That he now is and at all of the times mentioned in the First Amended Petition herein was an agent and employee of Pacific Goodrich Rubber Company, to-wit, [58] the cashier and/or auditor of said Company, and that he is and at all times mentioned in said First Amended Petition, since June 30, 1934, was an officer of, to-wit, an Assistant Treasurer of The B. F. Goodrich Company.

That the books and records of said Pacific Goodrich Rubber Company show the quantity and quality of articles that Pacific Goodrich Rubber Company held for sale on August 1, 1933, which were processed wholly or in chief from cotton, to-wit, tire fabric, thread, and other materials, and the quantity and type of tires which were manufactured by Pacific Goodrich Rubber Company from said articles from August 1, 1933 to the 5th day of January, 1934, and the cotton content of the tires and the quantity of the processed cotton contained therein and the amount of cotton which was used in the manufacture of said tires which comprised articles processed from cotton on August 1, 1933, and which were held by Pacific Goodrich Rubber Company for sale or other disposition on said date and other items and matters relating to taxes paid by Pacific Goodrich Rubber Company and its dealings under all Revenue Acts and under the Agricultural Adjustment Act of the United States of

America,—which books and records were and are kept under the supervision and control of the said George Hubbell, his duties being, among others, to keep said books and records; that he, the said George Hubbell is familiar with and knows the prices at which tires were sold by Pacific Goodrich Rubber Company at all the times mentioned in said First Amended Petition herein and is familiar with and knows whether or not there was included in the price of the tires sold by Pacific Goodrich Rubber Company during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any [59] excise tax on the processed cotton contained in the tires manufactured and sold by Pacific Goodrich Rubber Company during said period, and is familiar and knows whether the prices at which Pacific Goodrich Rubber Company sold tires during said period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were any greater than the prices at which during said period Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, and knows whether any additional billing was made to customers and/or vendees who purchased said tires during said period after the assessment of \$15,880.64 was made against said Pacific Goodrich Rubber

Company as alleged in said First Amended Petition herein.

That on August 1, 1933, Pacific Goodrich Rubber Company held for sale or other distribution articles processed wholly or in chief value from cotton, to-wit, tire fabrics, threads, and other materials having a total cotton content of 782,474 pounds, hereinafter referred to as processed cotton: that pursuant to Section 16 of the Act of May 12, 1933, hereinafter referred to as the Agricultural Adjustment Act and the regulations of the Secretary of the Treasury established thereunder, duly prepared and filed with John P. Carter, deceased, then Collector of Internal Revenue for the Sixth District of California, its return showing the said processed cotton of 784,177 pounds, and paid to him a tax thereon at the rate of \$0.044184 per pound as duly fixed by the Secretary of Agriculture, in the total sum of \$34,648.08. Said tax was paid in four [60] installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,666.03

5. It is hereby stipulated that no portion of said tax of \$34,648.08 has been refunded to Pacific Goodrich Rubber Company or to this plaintiff.

6. That the said George Hubbell, if so called as aforesaid, would testify as follows:

During the period from August 1, 1933, through the 5th day of January, 1934, Pacific Goodrich Rubber Company manufactured and sold tires (exclusive of tax-free tires sold to the Government for export) which contained 705,806 pounds of the 782,474 pounds of processed cotton which were in Pacific Goodrich Rubber Company's inventories on August 1, 1933, being held for sale or other disposition by said Pacific Goodrich Rubber Company; that the other and remaining 76,668 pounds of processed cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires, or wasted.

That pursuant to Section 602 of the Act of June 6, 1932, hereinafter referred to as the Manufacturer's Excise Tax, Pacific Goodrich Rubber Company prepared and filed excise tax returns with respect to the tires which it sold during the period from August 1, 1933, through the 5th day of January, 1934: that in preparing said returns, Pacific Goodrich Rubber Company computed the weight of the tires subject to the manufacturer's excise tax but deducted from the aforesaid gross weight 782,474 pounds, being the weight of the processed cotton contained therein and on which a tax had been paid under Section 9-a or Section 16 of the Agricultural Adjustment Act, namely 782,474 pounds of [61] of processed cotton; that Pacific Goodrich Rubber Company reported in its manufacturer's excise tax returns for the period from August 1,

1933, through the 5th day of January, 1934, the remaining pounds in the tires sold during said periods and paid to the said John P. Carter, deceased, an excise tax of $2\frac{1}{4}$ cents per pound on such weight.

6(a) It is hereby stipulated that on or about the 10th day of April, 1934, the defendant assessed against Pacific Goodrich Rubber Company an additional manufacturer's excise tax in the sum of \$15,880.64 together with interest of \$569.74, and demanded that said additional tax be paid by Pacific Goodrich Rubber Company; that said assessment and demand was made upon Treasury Department Form 728, Revised November 1933; a full, true and correct copy of which is filed herein as plaintiff's Exhibit "C" and has the same force and effect as though the original thereof was so filed.

That said additional assessment included a tax of $2\frac{1}{4}$ cents per pound upon 705,806 pounds of processed cotton which Pacific Goodrich Rubber Company had deducted from the weight of the tires sold by it during the period from August 1, 1933, to the 5th day of January, 1934.

7. That said George Hubbell would further testify that the 705,806 pounds of processed cotton so assessed by the said John P. Carter, deceased, and/or the defendant, were a part of the 784,177 pounds of articles processed wholly or in chief value from cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, and upon which it had paid a tax of \$34,-

648.08 under Section 16 of the Agricultural Adjustment Act.

8. It is further stipulated and agreed that on or about April, 1934, Pacific Goodrich Rubber Company paid to the said John P. Carter, deceased, \$15,880.64 of said additional assessment [62] and on or about July 27, 1934, paid the balance of said assessment, namely, \$569.75, representing interest on the above described \$15,880.64. That said payments were made by Pacific Goodrich Rubber Company under protest and the said John P. Carter, deceased, and the defendant were fully so advised at the time of said payments.

That the said George Hubbell, if so called as above set forth, would testify that said payments were made by Pacific Goodrich Rubber Company solely to avoid penalties and said Pacific Goodrich Rubber Company so advised the said John P. Carter, deceased, and the said defendant.

9. It is further stipulated and agreed that on or about August 31, 1935, the plaintiff herein duly filed with Nat Rogan, successor to John P. Carter, deceased, as Collector of Internal Revenue for the Sixth District of California, a claim dated August 14, 1935, for refund of said tax of \$15,880.64, plus interest amounting to \$569.75 which had been assessed and collected by the defendant from Pacific Goodrich Rubber Company, a full, true and correct copy of said claim is filed herein as plaintiff's Exhibit "D" and has the same force and effect as though the original thereof was so filed.

10. It is further stipulated and agreed that on or about April 21, 1936, plaintiff duly filed with said Nat Rogan, successor of John P. Carter, deceased, as such Collector of Internal Revenue, its amended claim for refund of said tax of \$15,880.64, plus interest of \$569.75, all of which had been assessed and collected by the defendant from Pacific Goodrich Rubber Company, a full, true and correct copy of said claim is filed herein as plaintiff's Exhibit "E" and has the same force and effect as though the original thereof was so filed. [63]

11. It is further stipulated and agreed that the Commissioner of Internal Revenue denied and disallowed both the original and amended claims for refund by written notice to the plaintiff as successor to Pacific Goodrich Rubber Company, a copy of said denial and disallowance bearing date of May 22, 1936, is filed herein as plaintiff's Exhibit "F" and has the same force and effect as though the original thereof was so filed.

12. That the said George Hubbell, if so called as aforesaid, would testify that throughout the period from August 1, 1933 to about the 10 day of April, 1934, Pacific Goodrich Rubber Company was informed and believed that for the purpose of computing its Manufacturer's Excise Tax on tires manufactured and sold, it was entitled, under the provisions of Section 9-a of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either

under Section 9-a or Section 16 of the Agricultural Adjustment Act, and that Pacific Goodrich Rubber Company and plaintiff herein at all times prior to the 10 day of April, 1934, believed that its tax burden with respect to said tires would amount to \$0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; and that at no time during the period preceding the 10 day of April, 1934, did Pacific Goodrich Rubber Company or plaintiff herein contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional tax of 2¼ cents per pound on account of processed cotton contained in said tires, and on which it had paid a tax of approximately 4½ cents per pound under Section 16 of the Agricultural Adjustment Act; and that Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of tires sold during the period from August 1, 1933 to the 5th day of January, 1934, any amount [64] to cover any excise tax on the processed cotton contained in the tires manufactured and sold during said period; and that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, and that no

additional tax was proposed against Pacific Goodrich Rubber Company until long after all tires containing cotton held for sale or other disposition on August 1, 1933, had been sold and billed to purchasers of or vendees of Pacific Goodrich Rubber Company, and that no additional billing was made to said customers and/or said vendees and no additional amount collected from said customers and/or said vendees after the assessment of the above mentioned \$15,880.64.

13. It is further stipulated and agreed that each and all of the above and foregoing stipulations with respect to which the said J. C. Herbert and/or the said George Hubbell would testify if so called as witnesses in the above matter, shall be taken with the same force and same effect and to the same extent as though the said J. C. Herbert and/or the said George Hubbell had been so sworn and so testified, all as hereinabove set forth.

Dated: February 10, 1940.

F. C. LESLIE

EUGENE H. BLANCHE

Attorneys for Plaintiff

BEN HARRISON,

United States Attorney,

By ARMOND MONROE JEWELL,

Assistant United States Attorney

Attorney for Defendant

[Endorsed]: Filed Feb. 10, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [65]

At a stated term, to-wit: The February Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 10th day of February in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for trial; Eugene H. Blanche, Esq., appearing as counsel for the plaintiff; A. M. Jewell, Assistant U. S. Attorney, appearing as counsel for the Government; A. Wahlberg, Court Reporter, being present; and F. C. Leslie, Esq., is now associated as counsel for the plaintiff herein for the purposes of this case; at 10:07 o'clock A. M. both sides answering ready, it is ordered to proceed.

Attorney Blanche makes a statement of the plaintiff's case; Attorney Leslie makes a further statement of the plaintiff's case; Attorney Jewell makes a statement of the Government's case. Attorney Blanche now presents Stipulation of Facts, which is ordered filed herein. The following exhibits are offered and admitted in evidence:

Plf's Ex. A—Copy of Assignment, dated 6/30/34.

Plf's Ex. B—Copy of Assignment, dated 8/14/35,

Plf's Ex. C—Copy of Return for Nov. & Dec. 1933,

Plf's Ex. D—Copy of Claim for Refund, dated 8/19/35,

Plf's Ex. E—Copy of Amended Claim Refund, dated 3/30/36

Plf's Ex. F—Copy of Claim for Refund, dated 8/19/35,

Plf's Ex. G—Copy of Amended Claim for Refund, Form 843,

Plf's Ex. Hl, Ha, and Hs—Three (3) Letters, Treas. Dep't to Goodrich Co.,

Plf's Ex. I—Copy of Minutes of 7/6/34 and 8/24/34,

Plf's Ex. J—Copy of Certificate of Dissolution, dated 12/21/34.

At 10:30 o'clock A. M. the plaintiff rests.

Attorney Jewell now offers the following exhibits, and the same are received in evidence:

U. S. Ex. 1—Copy of Return, dated Nov. 1933,

U. S. Ex. 2—Copy of Return, dated Dec. 1933, [66]

U. S. Ex. 3—Copy of Claim for Abatement, dated 7/7/36,

U. S. Ex. 4—Copy of Claim for Abatement, dated 5/27/36.

At 10:30 o'clock A. M. the Government rests.

Attorney Blanche makes a further statement and moves to amend Petition herein as to certain typographical errors being corrected and there being no objections thereto, it is so ordered, the Clerk now correcting same by interlineation on the original Petition herein.

The plaintiff and the Government rest.

It is ordered that the cause be submitted for decision on briefs to be filed 20 x 20 x 10 commencing February 12, 1940. [67]

[Title of District Court and Cause.]

CONCLUSIONS OF THE COURT ON THE MERITS OF THE ACTION.

This is an action by the plaintiff corporation, as sole owner of the stock of, and as assignee of Pacific Goodrich Rubber Company, a corporation, to recover the sum of \$16,450.39, with interest. The demand is based upon claims for refund of taxes paid by Pacific Goodrich Rubber Company under protest, and alleged by the plaintiff to have been erroneously computed and assessed by the Commissioner of Internal Revenue under Section 602 of the Revenue Act of 1932.

The record shows the following factual situation:

During the period from August 1, 1933, through September 30, 1933, the taxpayer, Pacific Goodrich Rubber Company, manufactured and sold tires which contained approximately 705,806 pounds of

cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue, a so-called "floor tax" levied by Section 16 of the Agricultural Adjustment Act, 48 Stat. 31, at the rate of .044184 per pound. In computing the excise taxes imposed by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold after August 1, 1933, taxpayer took a deduction from such excise tax as provided in Section 9 of the Agricultural Adjustment [68] Act, *supra*; in other words, the taxpayer arrived at the excise tax due under the 1932 Act by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of the processed cotton in such tires, upon which a so-called "floor tax" had been paid under Section 16, *supra*. This claimed credit or deduction was disallowed by the Bureau of Internal Revenue, and the tax authorities of the United States thereupon demanded additional manufacturer's tax under Revenue Act of 1932, and the taxpayer, Pacific Goodrich Rubber Company, in order to avoid penalties and interest, paid under protest the additional manufacturer's tax and interest in the sum of \$16,450.39. This action followed claims, both by the taxpayer and by the plaintiff, for the refund of said sum of money, with interest, which have been rejected by the Government.

The position of the United States is substantially that, despite the fact that the taxpayer had paid the tax on the cotton in the tires under provisions of the

Agricultural Adjustment Act, it was not entitled to refund of the \$16,450.39.

The aforesaid section of the Revenue Act of 1932 imposed a tax upon tires, wholly or in part of rubber, of 2¼¢ a pound on total weight of sales by manufacturers.

Section 9(b), *supra*, provided that “upon any article upon which a manufacturer’s sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer’s sales tax is computed on the basis of weight, such manufacturer’s sales tax shall be computed on the basis of weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.” [69]

Section 16, *supra*, titled “floor stocks” imposes a tax equal in amount to the processing tax imposed by other parts of Title I of the Agricultural Adjustment Act.

The primary question for decision under the stipulation of facts filed herein, and the further record evidence received at the hearing in court on February 10, 1940, is whether plaintiff’s predecessor and assignor, a tire manufacturer, was entitled in the computation of its sales tax on tires under the Revenue Act of 1932 to deduct from the weight of the taxed tires the weight of the taxed cotton therein upon which it had paid the tax specified in Section 16 of Title I of the Agricultural Adjustment Act.

Secondly, if under the facts of this case, such deduction or credit is proper and allowable to the tax-

payer company under the Revenue Act of 1932, is the plaintiff in this action, who was not actually the taxpayer, entitled under the record to require a refund to it of such overpayment?

Plaintiff contends that the tax credit or refund sued for in this action is neither a "floor stock tax" nor a "processing tax," but, rather, an "additional manufacturer's excise tax;" but assuming that such is the case, and on demurrer we substantially held that it was, yet, in order for the plaintiff to recover in this action it must show that Section 9 of the Triple A Act authorizes the credit demanded.

If the section is read and considered literally, its provisions are restricted to paid "processing taxes" as such are expressly defined in the Agricultural Adjustment Act. It is undeniable that the so-called "floor stock" tax provided for in the Agricultural Adjustment Act is not within the literal terms of Section 9. Indeed, the tax [70] levied under Section 16 is not defined in the Act; but the established rule that where the words of a statute are clear there is no room for construction, is not to be applied where the literal meaning produces an unreasonable result—one that is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Assn.*, 310 U. S. 534.

In my opinion, an examination of Title I of the Agricultural Adjustment Act with the aid and in the light of the correlative legislative history and material which led up to this remedial law, clearly

shows the error and injustice of the contention that the deduction computation provided in Section 9 is inapplicable to the unnamed tax imposed by Section 16, or that deductions under Section 9 should be confined to specifically defined "processing" taxes according to the letter of the law. To so restrict the application of Section 9a would utterly destroy the chief factor present in the legislative mind in making omnibus provisions to prevent tax discrimination between tire manufacturers without any real differentiation of business activity in or use of fabricated commodities. See *United States v. Dickerson*, 310 U. S. 554.

The intent and purpose of Congress must be ascertained as of the time of enacting the Agricultural Adjustment Act and not by looking backward and taking into consideration the untoward consequences that ensued from the decision of the Supreme Court in *United States v. Butler*, 297 U. S. 1.

To construe the refund or credit provisions of the Triple A so as to include the so-called "floor stock" taxes as well as the statutorily defined "processing" taxes instead of adding "something entirely new to the meaning [71] of the word 'processing', as it is used" in the statutes, as argued by the Government, merely sheds light upon what appears from reading the whole of Title I to have been the painstaking purpose of Congress—namely, the prevention of discrimination and double taxation.

We have been unable to find from an analysis of the applicable tax statutes any reason why the Con-

gress should desire to relieve the manufacturers of the burden of double taxation where one tax is a processing tax and the other is a sales tax and not to relieve the same manufacturers of double taxation when one of the taxes is a so-called "floor stock tax" and the other is a sales tax; therefore, the danger of going beyond the literal interpretation of a taxing statute, adverted to in *United States v. American Trucking Assn.*, *supra*, is not present in the consideration of the tax legislation pertinent to this action.

The Government substantially contends that the decision of the United States Supreme Court in *United States v. Butler*, *supra*, declaring certain portions of the Agricultural Adjustment Act to have been unconstitutional, operates to nullify all refund rights of taxpayers which arise by virtue of any feature of the taxing scheme invalidated. We are not impressed with this claim—it fails to evaluate the effect of Section 14 of Title I of the Act, which is as follows:

"If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance or commodity is held invalid, the validity of the remainder of this title and the applicability thereof to other persons, circumstances or commodities shall not be affected thereby."

Moreover, while the claim which is the basis of this action [72] has relation to the levy of the so-called

“floor stock” taxes provided for in Title I of the Triple A, the refund which is here sought is for an erroneously paid “manufacturer’s excise tax” assessed and collected under the aforesaid effective section of the Revenue Act of 1932.

We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor, v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350.

In view of our conclusion that the refund sued for in this action is for an unjustly collected manufacturer’s excise tax, the administrative procedure under Section 902,, et seq. of the Revenue Act of 1936 is unnecessary and inapplicable. In this connection the attitude and action of the governmental tax agencies throughout, as shown by the record before us, indicates that the claim in suit was considered by them as pertaining to an “additional manufacturer’s tax,” and we think that the United States should now in good conscience be prevented from taking a contrary stand to the prejudice of a wronged taxpayer.

The ultimate question is whether or not the plaintiff company is entitled under the record before us to the tax refund demanded in this action.

The observation of Justice Holmes, in *Rock Island, etc., Railroad Co. v. United States*, 254 U. S. 141, that "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be [73] complied with," are strikingly applicable to the right of the plaintiff corporation to require in this action payment to it of money in the United States Treasury which has been wrongfully exacted from another company as taxes.

The plaintiff by its "First Amended Petition" alleges its right to recover the erroneously computed and collected manufacturer's excise tax by reason of its sole ownership of the capital stock and assets of the taxpayer, and also because of two assignments to it dated June 30, 1934, and August 14, 1935, respectively, of all claims, rights and choses in action which the taxpayer then had or might have against all persons, firms or corporations, and particularly the tax refund claim against the United States. The only substantial difference between the two assignments appears to be that the latter was acknowledged before a notary public while the former is not so acknowledged.

It is to be noted that there is a variance between this enlarged claim in the amended petition and the claims for refund which were filed by the taxpayer and by plaintiff company with the Commissioner of Internal Revenue and rejected by him. In the latter under Form 843 the claims are based solely upon

the assignments and there is no mention therein of the stock ownership of the corporation taxpayer.

The Supreme Court has held that literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Tucker v. Alexander, Collector*, 275 U. S. 228.

The variance to which we have adverted is not occasioned by failure to comply with statutory requirements but rather to the requirement of the Treasury regulations [74] which state that claims for refund must set forth in detail each ground upon which they are made, and facts sufficient to apprise the Commissioner of the exact basis thereof. Such a requirement may be waived. *Tucker v. Alexander*, *supra*; *University Distributing Co. v. United States*, 22 Fed. Supp. 794; *Con-Rod Exchange, Inc. v. Henriksen, etc.*, 27 Fed. Supp. 427. The Commissioner, as shown by Exhibit "H" in evidence, appears to have rejected all claims for refund upon the broad ground that no right to refund existed in the taxpayer or the plaintiff under the Commissioner's interpretation of Section 9a of the Agricultural Adjustment Act, and the failure of the United States to insist at any time upon the literal compliance with the regulations is tantamount to a waiver in that regard.

It is settled law that except as to assignments by operation of law all transfers and assignments made

upon any claims upon the United States shall be absolutely null and void unless executed with certain specified formalities after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Section 203, Title 31, U. S. C. A. *Seaboard Air Line Railway v. United States*, 256 U. S. 655; *Kingan & Co. v. United States*, 44 F. (2d) 447.

The position taken by the plaintiff throughout the prosecution of the claim to tax refund demanded by this action has been until the filing of First Amended Petition herein on February 5, 1940, that its cause of action and right to recover is based upon the two assignments—only at such late day did the plaintiff assert its right to the refund as sole stockholder of Pacific Goodrich Rubber Company—or by reason of the taxpayer corporation having [75] dissolved December 21, 1934. There does appear in the record before us an authenticated claim of the plaintiff as successor to the taxpayer company, filed with the Collector July 8, 1936, and marked in evidence as Exhibit “3”, for abatement of certain taxes, in which plaintiff makes the statement that it is the taxpayer by reason of the assignment of June 30, 1934, and the dissolution of the taxpaying corporation on December 21, 1934. This exhibit, we think, does not materially alter the position which has been taken by the plaintiff until the exigency of avoiding the consequence of the statute relating to assigned claims against the United States

became imminent. But the chose in action did not lodge in plaintiff by its ownership of all the corporate stock of the Pacific Goodrich Rubber Company, or by the dissolution of that corporation on December 21, 1934. It vested by reason of the assignments which were executed voluntarily by the two corporations for expressed valuable considerations. The status of the plaintiff as a claimant against the United States is clearly within the inhibition of Section 203, Title 31, U. S. C. A.

The claim in suit has not been allowed, its amount has not been ascertained, and no warrant for its payment has been issued.

Section 621d of the Revenue Act of 1932, 26 U. S. C. A., Title 3443, provides as follows:

“(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, [76] or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.”

This is a statutory requirement which is the yardstick or measuring rod by which we are to determine a litigant's right to sue the United States for refund or credit of an overpayment of a tire manufacturer's excise tax imposed by Section 602 of the Revenue Act of 1932, 26 U. S. C. A., Section 3400, and is the statute invoked by the plaintiff in the case at bar, and in order to maintain the action The B. F. Goodrich Company, a corporation, must bring itself within the literal and strict requirements of this statute. This, we think, it has not done. The plaintiff is not the "person who paid the tax." It is a corporate entity distinct from the corporate taxpayer. The latter, during the manufacturing period upon which the credit or right to refund is claimed, conducted business and commercial operations in its own corporate name and capacity; made its own tax returns to the United States; paid under its protest, upon demand of the governmental taxing agencies, the excess tax and interest which are the subject matter of this action, and claimed the right to refund of the illegally collected manufacturer's tax *sui juris*. It is significant upon the question as to the "person" who paid the tax and as to plaintiff's right to recover it, to note that all of the money sued for was paid or "caused" to be paid by Pacific Goodrich Rubber Company, and that such payments were made partly before and partly after June 30, 1934.

Even the assignments relied on by the plaintiff company recite that they are made upon good and

valuable [77] considerations inuring to the Pacific Goodrich Rubber Company, and the record before this court does not disclose what items made up these considerations. There is no adequate showing before us to warrant the application in this tax refund case of an alter ego principle of law. It is clear that for the protection of the Government and to prevent circuitous concealments of taxpayers the statutory requirement for tax refunds should be followed to the letter.

We think there is also another insuperable barrier to any refund to the plaintiff in this action under the record before us.

The burden of proving its right to refund rests throughout the action upon the plaintiff corporation and this burden is not sustained unless satisfactory evidence preponderates in plaintiff's favor, particularly that there has been no inclusion or collection by Pacific Goodrich Rubber Company of the tax in the price of the tires which have been sold by Pacific Goodrich Rubber Company. Substantially the only evidence produced upon this vital point is in the form of a stipulation entered into by Government counsel with the reservation as to its sufficiency, that the cashier and auditor of the taxpayer corporation would if called as a witness testify that he supervised, controlled and kept the books and records of the Pacific Goodrich Rubber Company at all times pertinent to this action and that he is familiar with and knows the prices at which tires were sold by the taxpayer at all applicable times:

that he knows that during the period from August 1, 1933, to January 5, 1934, the taxpayer did not include or intend to include in the price of tires sold during such period any amount to cover any excise tax on the processed cotton contained in the tires manufactured [78] and sold during such period; that the prices at which the taxpayer sold tires during such period were no greater on tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act than the prices at which during such period it sold tires containing processed cotton on which a tax was payable under Section 9 of the Triple A. No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue. We are not satisfied that the required burden of the non-passage of the tax to vendees of the taxpayer has been sustained. Judgment is ordered for the defendant. Exceptions to each party on adverse rulings.

Dated December 31, 1940.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Dec. 31, 1940. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy. [79]

[Title of District Court and Cause.]

MINUTE ORDER ON DECISION OF ACTION
ON THE MERITS.

Findings of fact, conclusions of law and judgment for defendant with costs ordered for defendant, upon issues of "First Amended Petition" and stipulated answer of defendant, in accordance with written conclusions of the Court on the merits of the action filed this day. Attorneys for respective parties will collaborate, prepare and present such findings of fact, conclusions of law and judgment within ten days from notice hereof. Exceptions allowed respective parties on each and every adverse ruling.

Dated December 31, 1940. [80]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Eugene H. Blanche, the attorney of record herein for The B. F. Goodrich Company, a corporation, the plaintiff herein, having died, said The B. F. Goodrich Company, a corporation, has and does hereby substitute and appoint the firm of Newlin & Ashburn as its attorneys of record herein for and in the place of said Eugene H. Blanche.

Dated: this 20 day of January, 1941.

THE B. F. GOODRICH COMPANY

By J. L. McKNIGHT

Assistant Secretary

The undersigned do hereby accept the above substitution.

Dated: this 22 day of January, 1941.

NEWLIN & ASHBURN

RAY J. COLEMAN

[Endorsed]: Filed Feb. 3, 1941. R. S. Zimmerman, Clerk. [81]

[Title of District Court and Cause.]

NOTICE OF MOTION TO REOPEN CASE
TO ADMIT FURTHER PROOF

To the Above Named Defendant and to Its Attorneys William Fleet Palmer, United States Attorney, and Armond Monroe Jewell, Assistant United States Attorney:

You and Each of You Will Please Take Notice that on Monday, the 17th day of February, 1941, at ten o'clock A. M., or as soon thereafter as counsel can be heard, in Courtroom No. 8 of the above entitled court in the Federal Building, in the City of Los Angeles, California, the plaintiff will move the court to reopen the trial of this action to permit plaintiff to offer further evidence to prove or tending to prove (a) that the tax, the refund of which is sought in this action, was not passed on to the vendees of plaintiff's predecessor in interest, (b) that plaintiff acquired the right to the refund of said tax by operation of law upon the dissolution of plaintiff's predecessor in interest and the distribu-

tion of all of its assets to the plaintiff, (c) that there was no consideration for [83] the written assignments to it of the assets of its predecessor in interest, including the right to the refund of said tax, other than such consideration as normally flows from a distribution in liquidation, (d) that plaintiff is the proper party under Sec. 621(d) of the Revenue Act of 1932 to assert the rights of and establish the facts required to be established by "the person who paid the tax," (e) that it was and is the policy and practice of the Commissioner of Internal Revenue to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the tax," and (f) that plaintiff's predecessor in interest although a separate corporation was a wholly owned subsidiary of the plaintiff, that said corporation and the plaintiff had common officers and an interlocking board of directors and that plaintiff's predecessor in interest was operating with a deficit at the time the tax sought to be recovered herein was paid and that as a consequence the payment of said tax although made by check of the plaintiff's predecessor in interest actually reduced plaintiff's assets; to permit the plaintiff to amend its First Amended Petition to conform with the proof; to permit the defendant to offer such evidence in rebuttal as it may see fit; and to permit further argument of counsel upon such evidence as may be received by the court.

That said motion will be based upon the following grounds:

1. That the further evidence sought to be introduced to prove the facts alleged in item (a) on page 1 above would have been offered at the trial except for the fact that plaintiff and its counsel were of the opinion, based upon conversations with defendant's counsel prior to trial and upon the stipulation of counsel for plaintiff and defendant made in open court, that no right was reserved in the defendant to object to the testimony set forth in the stipulation of facts on the ground that it was not the best evidence and that plaintiff and its counsel were not aware of any misunderstanding or [84] basis for misunderstanding of counsel with reference thereto and did not anticipate that said stipulation made in open court would or could be construed by the court to permit the defendant to object to such testimony on the ground that it was not the best evidence;

2. That the further evidence sought to be introduced to prove the facts alleged in items (b) and (c) on page 1 above would have been offered at the time of trial except for the fact (1) that the plaintiff by its First Amended Petition intended to and thought that it had based its right of recovery solely upon the transfer to it by operation of law of the right to the refund of said tax, (2) that the defendant neither alleged nor urged any defense based upon the contention that plaintiff's right of recovery was bottomed upon said written assignments, (3) that the plaintiff did not allege in its

First Amended Petition or otherwise contend that said assignments were executed for a valuable consideration other than that which normally flows from a distribution in liquidation, nor did the defendant so contend either by defenses raised in its answer or otherwise, and (4) that plaintiff and its counsel were of the opinion that the evidence introduced at the time of trial was sufficient to conclusively prove that the right to the refund of said tax was transferred to the plaintiff by operation of law upon the distribution to it in liquidation of the assets of its predecessor in interest and that said assignments, as alleged in plaintiff's First Amended Petition, were only physical evidence of the distribution in liquidation and that there was no consideration therefor other than that which normally flows from such distribution;

3. That the further evidence sought to be introduced to prove the facts alleged in items (d), (e) and (f) on pages 1 and 2 above would have been offered at the time of trial except for the fact that the claims for refund which were filed by the plaintiff and its predecessor in interest were not rejected on the ground that [85] the plaintiff was not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932, that no defense to that effect was expressly alleged in the defendant's answer or asserted by the defendant at time of trial or in the brief which it filed with the court, and that it was the understanding of the plaintiff and its counsel

that it was the established policy and practice of the Commissioner of Internal Revenue to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the taxes";

4. That the further evidence sought to be introduced is essential to a proper determination of the issues presented in this case and in the interests of justice should be presented to the court for its consideration;

5. That the further evidence sought to be introduced relates either to issues on which such evidence was deemed unnecessary by reason of stipulation of counsel or to defenses which the plaintiff with good excuse did not anticipate since they were not urged by the Commissioner of Internal Revenue in advance of trial or by the defendant at time of trial and were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted.

That said motion will be based upon this written notice thereof and upon the memorandum of authorities and the affidavits of F. C. Leslie, George Hubbell and S. M. Jett hereto annexed, and upon the minutes, records and files of the above entitled court in this cause.

Dated: Feb. 3, 1941.

NEWLIN & ASHBURN

By RAY J. COLEMAN

Attorneys for Plaintiff [86]

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION TO REOPEN

1. When the trial judge after submission of a case concludes that material and necessary testimony which has been offered is not competent he should reopen the case of his own motion to admit further proof.

Paine v. St. Paul Union Stockyards Co., 28 F.
(2d) 463, 467;
4 Cyc. of Fed. Proc., Sec. 1454, p. 998.

2. Until final judgment the case is under the control of the court which may reopen it for further proof at any time.

G. Amsinck & Co. v. Springfield Grocer Co.
7 F. (2d) 855, 858;
4 Cyc. of Fed. Proc., Sec. 1454, p. 998.

3. The assignment by a corporation to its stockholders of a claim against the United States merely passes legal title to such claim to parties who already own the entire beneficial interest [87] therein and such assignment even in the absence of a formal dissolution of the corporation is not rendered void under Section 3477 of the Revised Statutes where the assignment of such claim together with the other assets of the corporation is intended to effect a distribution in kind of all of the assets of the corporation.

Novo Trading Corp. vs. Commissioner of Internal Revenue (C. C. A. 2) 113 F. (2d) 320;

Kingan & Co. v. United States, 44 F. (2d) 447, 451;

Consolidated Paper Co. v. United States, 59 F. (2d) 281, 288; cert. den. (1933) 77 L. ed. 988.

4. In the event of the transfer of a claim against the United States, which transfer is not rendered void under Section 3477 of the Revised Statutes, the transferee rather than the transferor of such claim is the proper party to file the refund claim and to maintain a suit to recover on the claim.

G. C. M. 21058; C. B. 1939-1 (Part I) p. 280; Monarch Mills v. Jones, 56 F. (2d) 180, 183; (Aff'd 59 F. (2d) 502.)

Consolidated Paper Co. v. United States, 59 F. (2d) 281, 288; cert. den. (1933) 77 L. ed. 988.

Kingan & Co. v. United States, 44 F. (2d) 447, 451;

National Foods, Inc. v. United States, 13 F. Supp. 364; 82 Ct. Cl. 627; cert. den. Oct. 12, 1936;

5. The transferee by operation of law of the right to a refund of manufacturer's excise taxes is the proper party under Sec. 621(d) of the Revenue Act of 1932 to assert the rights of and establish the facts required to be established by "the person who paid the tax."

G. C. M. 21058; C. B. 1939-1 (Part I) p. 280.

In G. C. M. 21058, *supra*, G. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, made the following statements: [88]

“It is held, therefore, that title to the claim in the present case was obtained by the N Company by operation of law and that the provisions of section 3477 did not preclude its transfer.

“The question remains as to whether a proper claim for refund has been filed in this case.

“Section 903 of the Revenue Act of 1936 provides that ‘No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person * * *.’ The person who paid the tax in this case was the M Company. However, that company, if still in existence, has neither interest nor title to the claim for refund. The N Company ‘stands in the shoes’ of the M Company, having acquired all right, title, and interest in the claim against the Government. In *National Foods, Inc., v. United States* (82 Ct. Cl., 627, 13 Fed. Supp. 364, certiorari denied October 12, 1936) it was held that the assignor of a claim against the Government (which claim had been transferred by operation of law) was not the proper party to maintain a suit to recover on the claim. It is held in the present case that the N Company is the proper party to file the refund claim.” [89]

[Title of District Court and Cause.]

AFFIDAVIT OF F. C. LESLIE
IN SUPPORT OF MOTION TO REOPEN

United States of America,
State of Ohio,
County of Summit—ss.

F. C. Leslie, being by me first duly sworn, deposes and says:

That affiant is the assistant counsel for The B. F. Goodrich Company, a corporation, the plaintiff herein, and as such was present at the trial of the above entitled action before the above named court on February 10, 1940, and participated in said trial after having first secured the consent of the court so to do.

That Eugene H. Blanche, the attorney of record for the plaintiff herein at the time of the trial and for some time prior thereto, died before the entry on December 31, 1940, of the court's "Minute Order on Decision of Action on the Minutes."

That affiant participated in the preparation of the stipulation of facts which was filed in said action and is familiar with [90] the terms thereof and with the conditions upon which it was agreed by counsel for plaintiff and defendant that the same might be filed with the court; that said conditions were stated by said Eugene H. Blanche in open court at the time of trial in the following words:

"By stipulation of counsel for the Government there will be no question of a foundation

raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.

“We appreciate that the latter may always be raised, but in order that there may be no misunderstanding, we make that statement.

“The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.”

That prior to the trial of said action and the making of said statement in open court, one or more conferences were held in the City of Los Angeles, at which said Eugene H. Blanche, the affiant, and Armond Monroe Jewell, the attorney for the defendant were present and at which the stipulation of facts and the conditions under which it would be filed were discussed. That at one or more of said conferences and in particular at a conference held at the office of the plaintiff in Los Angeles County, California, at which George Hubbell, an officer of the Pacific Goodrich Rubber Company, was also present, it was agreed that the stipulation of facts should be filed without the reservation of any objection except as to the ma-

teriality and relevancy of the stipulated facts and as to the sufficiency of the proof made. That at that time, said Armond Monroe Jewell stated that his reservation as to the sufficiency of the proof did not go to the foundation of the stipulated testimony and in the discussion as to whether or not a reservation should be preserved, said Jewell gave as one of his reasons for wanting such reservation that it had been the Commissioner's theory in other cases that the establishment of the fact that [91] the tax was not included in the price charged to the purchaser did not conclusively establish or prove that the tax was not passed on to the purchaser; that after the filing of the defendant's brief in said action, in which the objection to the testimony of said George Hubbell was first raised on the ground that it was not the best evidence, the said Eugene H. Blanche stated to affiant that it was never his intention that there should be reserved in either the plaintiff or the defendant any right to object to the testimony set forth in the stipulation on the ground that it was not the best evidence and that it was not and never had been his understanding that such right had been reserved; that on the contrary it was his intention and understanding, as stated in open court in the presence of counsel for the defendant, that "there (would) be no question of a foundation raised" and that any objection to the sufficiency of the proof made would be such an objection as might "always be raised," that is, an objection based

upon a failure to sustain the burden of proof rather than a failure to produce the best evidence.

That based upon the aforementioned discussions with said Armond Monroe Jewell, the attorney for the defendant; upon statements made by Eugene H. Blanche to affiant prior to the time of trial with reference to his understanding of the purpose of the reservation of the right to object to the sufficiency of proof and upon the affiant's own independent interpretation and understanding of the above quoted statement made by said Eugene H. Blanche in open court, it was the belief of affiant at the time of trial and still is his belief that no right was reserved in the defendant to object to the testimony of George Hubbell as set forth in the stipulation of facts on the ground that it was not the best evidence; that had affiant known that counsel for defendant did not concur in this belief and that there was a misunderstanding between counsel for plaintiff and defendant as to the reservation of such right or that the above quoted statement of said Eugene H. Blanche would be construed by the court as [92] reserving such right in the defendant, affiant would have and could have caused to be produced in court at the trial of said action books and records of Pacific Goodrich Rubber Company, the predecessor of the plaintiff, which, together with other competent and admissible testimony interpreting such books and records in conformity with the policy, intent and practices

of such corporation, would have confirmed the testimony of said George Hubbell as to the ultimate facts as set forth in the stipulation of facts, and would have shown that the tax in question was not passed on to the vendees of said corporation.

That the First Amended Petition of the plaintiff was filed in said action pursuant to the instructions and advice of the affiant and it was the intent of the affiant as therein alleged, and said Eugene H. Blanche stated to affiant that it was his intention as therein alleged, to base the plaintiff's right of recovery solely upon the fact that the plaintiff as the sole shareholder of Pacific Goodrich Rubber Company "became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with title to" the right to secure the refund of the taxes in question. That in conformity with such intent and as proof of said allegations of the First Amended Petition and the further allegations that the two written assignments of assets which were executed by Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively, were merely "physical evidence, affirmative proof and in confirmation of" said "distribution in kind" the plaintiff caused to be introduced in evidence at the time of trial the testimony of J. C. Herbert that the plaintiff was, at all times, the sole stockholder of Pacific Good-

rich Rubber Company and that said Company was dissolved on or about December 21, 1934, and also caused to be introduced in evidence a certified copy of the certificate of dissolution of said corporation dated December 21, 1934, and [93] certified copies of the minutes of the special meetings of the Board of Directors and stockholders of said corporation held on July 6, 1934, in which is set forth the duly adopted resolutions of said bodies to dissolve the Pacific Goodrich Rubber Company and to ratify the action previously taken by its management in transferring and delivering over all of its assets to the plaintiff "as a distribution in kind to the stockholders of all the assets of said corporation" and in which stockholders' minutes there appears the statement that said corporation "acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the Company." That said Eugene H. Blanche stated to affiant that it was his belief and it also was and is the belief of affiant that such testimony and evidence conclusively proved the aforementioned allegations of the First Amended Petition and also conclusively proved that said written assignments of assets were, as alleged in said petition, only physical evidence and affirmative proof of said distribution in kind and that there was no consideration for said assignments other than that which normally flows from

a distribution in liquidation; that said Eugene H. Blanche also stated to affiant that it was his belief that it also was and is the belief of affiant that, even if such testimony and proof did not conclusively prove that there was no consideration for said assignments other than that which normally flows from a distribution in liquidation, that said assignments, to the extent that they embraced claims against the United States, were nevertheless void and of no effect as instruments of transfer apart from the distribution in liquidation and, being void, such testimony and evidence did conclusively prove that all claims against the United States which remained in the Pacific Goodrich Rubber Company [94] by reason of such invalidity, passed to the plaintiff by operation of law upon the dissolution of the Pacific Goodrich Rubber Company. That had there been any issue raised by the pleadings or had the defendant asserted any defense based upon the contention that the plaintiff was relying either in whole or in part upon the two aforementioned assignments as the basis for its recovery or had affiant known that the court, as noted on page 7 of its Conclusions on the Merits, would construe the allegations of said First Amended Petition as an assertion by the plaintiff of the right of recovery not only "by reason of its sole ownership of the capital stock and assets of the taxpayer" but "also because of two assignments to it dated June 30, 1934, and August 14, 1935, respectively"

or had the defendant asserted any defense or advanced any contention to the effect that said assignments were not executed and delivered as a step in the dissolution of the Pacific Goodrich Rubber Company or that said assignments were executed and delivered for a valuable consideration other than that which normally flows from a distribution in liquidation or had affiant known or anticipated that further evidence in this connection would be desired by the court, despite the invalidity of such assignments as instruments of transfer apart from the distribution in liquidation, affiant would have asked leave of the court to amend said First Amended Petition to more clearly express the intent of the plaintiff to base its right of recovery solely upon the rights acquired by it through operation of law upon the distribution in liquidation and affiant could and would have caused to be offered in evidence competent and admissible testimony of an executive officer or officers of the B. F. Goodrich Rubber Company and [95] Pacific Rubber Company, who brought about such "distribution in kind" on June 30, 1934, that such distribution was intended to be and was in fact a distribution in liquidation and was made in anticipation of the immediate dissolution of said Pacific Goodrich Rubber Company, that the two aforementioned assignments were executed by Pacific Goodrich Rubber Company in favor of plaintiff for the sole purpose of evidencing such transfer, that there was no agreement or understanding between the

Pacific Goodrich Rubber Company and the plaintiff for the payment of any consideration for the transfer of said assets and that there was no consideration for such transfer or for said assignments other than the surrender by the plaintiff in due course of dissolution of its shares of stock of Pacific Goodrich Rubber Company for cancellation.

That the claims for refund which were filed by the plaintiff were not rejected by the Commissioner of Internal Revenue on the ground that the plaintiff was not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932, nor was any defense to that effect expressly alleged in the defendant's answer or asserted by the defendant at time of trial or in the brief which it filed with the court. That by reason of these facts and the further fact that it was the established policy and practice of the Commissioner of Internal Revenue, as understood by affiant, to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the tax," the affiant was [96] of the belief that the plaintiff could properly assert the rights of and establish the facts which under the provisions of Sec. 621 (d) of the Revenue Act of 1932 are required to be established by "the person who paid the tax;" that had affiant anticipated any possibility of the contention being advanced that under said Sec. 621 (d) of the Revenue

Act of 1932 plaintiff could not assert the rights of or establish the facts required to be established by "the person who paid the tax," or had affiant anticipated that there would be any uncertainty in the court's mind with reference thereto he could and would have attempted to subpoena the Collector of Internal Revenue or other proper agent of the defendant to testify with reference to the aforementioned practice and policy of the Commissioner of Internal Revenue, and could and would have caused to be offered in evidence competent and admissible testimony to the effect that the Pacific Goodrich Rubber Company, although a separate corporation, was a wholly owned subsidiary of the plaintiff, that said corporation and the plaintiff had mutual officers and interlocking Boards of Directors, and that said Pacific Goodrich Rubber Company was operating with a deficit at the time the tax sought to be recovered herein was paid and that as a consequence, the payment of said tax, although made by check of the Pacific Goodrich Rubber Company, actually reduced plaintiff's assets.

[97]

That affiant is of the firm conviction that the plaintiff can, and if given an opportunity to do so will, introduce evidence conclusively proving that the taxpayer bore the burden of the tax sought to be recovered in this action and that said tax was not passed on to the customers of the taxpayer.

F. C. LESLIE

Subscribed and sworn to before me, the undersigned authority, on this the 30th day of January, 1941.

ALBERTA M. TEWERS,

Notary Public in and for
said State and County.

My Commission Expires November 16, 1941.

(Seal) [98]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE HUBBELL
IN SUPPORT OF MOTION TO REOPEN

United States of America,
Southern District of California,
Central Division—ss.

George Hubbell, being by me first duly sworn, deposes and says:

That during the period from August 1, 1933, to June 12, 1934, he was the auditor of the Pacific Goodrich Rubber Company, a corporation; that during the period from June 12, 1934, to June 30, 1934, he was the assistant secretary and assistant treasurer of said corporation and that at all times since June 30, 1934, he has been an assistant treasurer of The B. F. Goodrich Company, a corporation.

That at all times during the period in issue in the above entitled action, certain books of account and records of said Pacific Goodrich Rubber Com-

pany were kept under his supervision and control; that he is familiar therewith; that it was his duty to keep all such books of account and records; that all entries made in said books of account which were not made by him were made under his direct supervision; that said books of account and records were kept in the regular course of the business of said corporation; that the business of said corporation is of a character in which it is proper and customary to keep such books of account and records; that the entries in such books of account are either the original entries or the first permanent entries of the transactions recorded therein, and [99] were made at the time, or within reasonable proximity to the time, of such transactions; and that the person making such entries had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business of said corporation whose duty it was to make such report in the regular course of business.

That if called as a witness in the above entitled action, he can and will produce from the aforementioned books of account and records of said Pacific Goodrich Rubber Company invoices, inventory records, manufacturing records, sales records and cost records from which, together with certain tax records and returns and the manufacturer's excise tax schedules prepared by said corporation and made effective by it on August 1, 1933, and in conjunction with his oral testimony

interpreting the same it can be shown and will appear that the testimony of affiant, as set forth in the Stipulation of Facts filed in the above entitled action, is in all respects true and correct, and from which it can be shown and will appear and upon the basis of which he can and will testify that the tax (the refund of which is sought in the above entitled action) was not passed on to the vendees of said corporation; that all tires containing cotton held for sale on August 1, 1933, and therefore subject to the floor stocks tax, were sold and the purchasers billed therefor long before any demand was made upon said corporation to pay said tax and at a time when said corporation, as he can and will testify and as said books and records will show, had no intention of paying said tax or thought of being required to pay it; that no additional sums were charged to or collected from said purchasers after demand for and payment of said tax.

That in particular said books and records will show and, upon the basis thereof, affiant can and will testify that effective August 1, 1933, said corporation prepared and released for its own use revised schedules of the manufacturer's excise tax payable [100] upon the sale of tires containing cotton; that the amount of the manufacturer's excise tax specified in said revised schedules was the net excise tax, namely, the excise tax less the credit for floor stocks or processing tax payable upon the cotton contained in said tires; that sub-

sequent to August 1, 1933, said revised schedules were used in determining the cost to the corporation of all tires manufactured and sold by it, and in determining the amount of the manufacturer's excise tax to be charged to those customers who were billed with said tax as a separate item.

That said books and records will further show and, upon the basis thereof, affiant can and will testify that said corporation had two types of customers, namely, original equipment customers and general wholesale customers; that on all invoices to original equipment customers the net excise tax, namely, the excise tax less the credit for the floor stocks or processing tax, was charged as a separate item; that on all invoices to general wholesale customers no separate charge was made for excise taxes, but, in determining the cost to the corporation of the tires sold to such customers, only the net excise tax, namely, the excise tax less the credit for floor stocks or processing tax, was included.

GEORGE HUBBELL

Subscribed and sworn to before me this 30th day of January, 1941.

ELIZABETH AKERMAN,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Dec. 3, 1942.

(Seal) [101]

[Title of District Court and Cause.]

AFFIDAVIT OF S. M. JETT
IN SUPPORT OF MOTION TO REOPEN

United States of America,
State of Ohio,
County of Summit—ss.

S. M. Jett, being by me first duly sworn, deposes and says:

That he is the secretary and a member of the Board of Directors of The B. F. Goodrich Company, the plaintiff in the above entitled action.

That at all times during the period from August 1, 1933, to December 21, 1934, he was the secretary and a member of the Board of Directors of the Pacific Goodrich Rubber Company and of The B. F. Goodrich Company.

That he was familiar with and had personal knowledge of the business and affairs of said Pacific Goodrich Rubber Company during said period from August 1, 1933, to December 21, 1934, and if called as a witness in the above entitled action he can and will testify of his personal knowledge as follows: [102]

That all of the stock of the Pacific Goodrich Rubber Company from the date of its issuance until the dissolution of said corporation was owned by The B. F. Goodrich Company; that on June 30, 1934, and for some time prior thereto six of the seven directors of Pacific Goodrich Rubber

Company were officers of The B. F. Goodrich Company and five of these six were also directors of The B. F. Goodrich Company.

That on June 30, 1934, Mr. J. D. Tew was the President and a member of the Board of Directors of the Pacific Goodrich Rubber Company. That on said date said J. D. Tew on behalf of said corporation and in his capacity as the President thereof, executed in the presence of affiant the written assignment of the assets of said corporation to The B. F. Goodrich Company, a copy of which assignment is set forth in the first amended petition of the plaintiff in the above entitled action.

That on June 12, 1934, the Board of Directors of The B. F. Goodrich Company, at a meeting duly called and held and at which a quorum was present and acting, by unanimous vote "Resolved, that the officers of the company be and they hereby are authorized to so alter the methods of distribution of the products manufactured by this company as to eliminate as far as feasible sales through subsidiary corporations and to report their action in this respect to this Board."

That prior to the execution of said assignment an informal meeting of a majority of the Board of Directors of said Pacific Goodrich Rubber Company, was held at Akron, Ohio, at which meeting the affiant, said J. D. Tew, S. B. Robertson and T. B. Tomkinson were present. That at said meeting it was proposed that said corporation be dissolved, that all of its assets be distributed in kind

to its sole stockholder, The B. F. Goodrich Company; that such distribution be made on June 30, 1934, and that meetings of the Board of Directors and of the stockholders of said Pacific Goodrich Rubber Company be held as soon as reasonably possible thereafter to authorize such dissolution and to ratify the act of said corporation in making said distribution in kind; that the affiant and all other persons present at said meeting expressed their consent and approval of said proposal. [103]

That meetings of the Board of Directors of the stockholders of said Pacific Goodrich Rubber Company were held at Akron, Ohio, on July 6, 1934, and certified copies of the minutes of said meetings were furnished by affiant for introduction in evidence at the trial of the above entitled action. That at said meetings said J. D. Tew, as President of said corporation, announced that the corporation acting through its officers had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the corporation, and it was unanimously resolved that said corporation be dissolved and that the act of the management in making said distribution in kind be and it was ratified.

That said assignment of June 30, 1934, was executed by said J. D. Tew as President of the Pacific Goodrich Rubber Company and attested by affiant as Secretary of said corporation solely for the purpose of evidencing said distribution in

kind. That there was no agreement or understanding between the Pacific Goodrich Rubber Company and The B. F. Goodrich Company for the payment of any consideration for said assignment or for said distribution in kind, and there was no consideration of any kind received by the Pacific Goodrich Rubber Company or intended to be received by it for said assignment other than the surrender for cancellation by The B. F. Goodrich Company in due course of dissolution of its shares of stock in said Pacific Goodrich Rubber Company.

S. M. JETT

Subscribed and sworn to before me this 28 day of January, 1941.

RUTH REES,

Notary Public.

My commission expires Aug. 28, 1941.

(Seal)

[Endorsed]: Notice of Motion to Reopen Case, etc., Filed Feb. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [104]

[Title of District Court and Cause.]

AFFIDAVIT OF ARMOND MONROE JEWELL,
IN OPPOSITION TO MOTION TO
REOPEN.

State of California,
County of Los Angeles—ss.

Armond Monroe Jewell, being first duly sworn, deposes and says:

That affiant is an Assistant United States Attorney for the Southern Judicial District of California and, as such, prepared the above entitled case for trial on behalf of the United States of America, defendant; and that affiant, as such Assistant United States Attorney, was present at the trial of the above entitled matter before the above named Court on February 10, 1940 and represented the said United States of America, defendant at the said trial;

That affiant represented the said United States of America, defendant, in the preparation of the Stipulation of Facts, which was filed in said action and therefore is familiar with the provisions thereof; that prior to said trial several conferences with reference to the Stipulation of Facts were held in the City of Los Angeles;

That these conferences were originally held between Eugene H. Blanche, now deceased, then counsel for plaintiff, and affiant; that a few days before trial Mr. F. C. Leslie, Assistant Counsel for the B. F. Goodrich Company, plaintiff herein, arrived

from Akron, Ohio, and participated in one or two of these conferences;

That at these conferences the Stipulation of Facts was discussed [106] and prepared;

That at these conferences the issue as to whether or not plaintiff had passed on the burden of the tax was discussed; that, in particular, there was discussed the manner in which plaintiff would attempt to prove that said burden of the tax had not been passed on; that affiant was informed by Mr. Blanche that it was his intention to call Mr. George Hubbell and Mr. J. C. Herbert, both officers of the plaintiff, and of the plaintiff's predecessor, and from them to adduce verbal testimony to the effect that the burden of the tax had not been passed on; that, as is customary with affiant in order to save the time of the Court in the trial of these tax cases, affiant suggested that if he were personally permitted to discuss the matter with Messrs. Hubbell and Herbert, he would stipulate as to what these witnesses might testify if they were called as witnesses and, thus, save the time of the Court at the trial; that, whereupon, affiant talked to Messrs. Hubbell and Herbert and, as a result of these conversations, he became personally convinced that they would unqualifiedly so testify were they called to Court;

That affiant and counsel for plaintiff then prepared a Stipulation which set forth what both of the respective counsel believed would be the testimony of these witnesses were they called to testify;

that at one of these conferences (the particular conference is not recalled by affiant) it was expressly agreed between affiant and Mr. Eugene H. Blanche that all reservations as to the sufficiency of the testimony to sustain the burden of proof of plaintiff would be reserved and, further, that affiant specifically cautioned the said Eugene H. Blanche that affiant did not believe that the verbal testimony of Messrs. Hubbell and Herbert was sufficient in that it was not the best evidence and affiant suggested that the books and records of plaintiff or plaintiff's predecessor, if any, were the only proper proof;

That at no time was it the intention of affiant to agree in [107] stipulating to what Messrs. Herbert and Hubbell would testify if they were called, that affiant on behalf of defendant waived the right to object to the introduction of these stipulations re testimony on the ground that the same were not the best evidence of the facts which the stipulations re testimony sought to prove;

That when Mr. Blanche in open court made the statement with reference to the Stipulation of Facts, that "By stipulation of counsel for the Government there will be no question of a foundation raised" affiant assented to the statement; that in so doing affiant did not intend to waive the right to object to the stipulated testimony upon the ground that it was not the best evidence.

ARMOND MONROE JEWELL

Subscribed and Sworn to before me, this 14 day of April, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk, U. S. District Court,
Southern District of California,

By LOUIS J. SOMERS,

Deputy.

[Endorsed]: Filed Apr. 14, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [108]

At a stated term, to-wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 15th day of April in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of the plaintiff to re-open the case and to admit further proof, pursuant to notice, filed February 3, 1941; Ray J. Coleman, Esq., appearing as counsel for the plaintiff; A. M. Jewell, Assistant U. S. Attorney, appearing as counsel for the Government; and C. W. Lunsford, court reporter, being present and reporting the testimony and the proceedings;

At 10:25 A. M. Attorney Coleman makes a statement in support of motion; at 10:40 A. M. Attorney Jewell makes a reply statement in opposition; and at 10:50 A. M. Attorney Coleman makes closing statement in support of motion.

The Court renders oral opinion and orders that the motion be denied. [109]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial on February 10, 1940, plaintiff being represented by F. C. Leslie, Esquire, and Eugene H. Blanche, Esquire, and defendant being represented by the United States Attorney for the Southern Judicial District of California, through Armond Monroe Jewell, Assistant United States Attorney, and evidence having been offered to and received by the Court, and the cause ordered submitted upon the filing of briefs in behalf of each party, and the said briefs having been filed, and this Court having drawn its "Conclusions of the Court on the Merits of the Action", and plaintiff, by its attorneys Newlin & Ashburn, through Ray J. Coleman, Esquire, having moved to reopen the case to admit further proof, and said motion having been opposed by defendant through its attorneys above named, and the Court having denied plaintiff's said motion to re-

open the case to admit further proof, the Court now makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That on June 20, 1927, Pacific Goodrich Rubber Company was incorporated under the laws of the State of Delaware, and that said corporation was dissolved on or about December 21, 1934.

II.

That plaintiff now is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws [110] of the State of New York; and that it is and at all times mentioned herein was qualified to do business in the State of California, and has its principal office and place of business in Akron, Ohio, with an office in Los Angeles, California.

III.

That defendant herein, the United States of America, now is and at all times herein mentioned was a body politic.

IV.

That this action arose under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Sec. 602, 47 Stat. 261, as modified by the Act of May 12, 1933, Chapter 25, Sec. 9 (a), 48 Stat. 35, and was brought

for the recovery of manufacturer's excise tax paid under protest by the plaintiff's predecessor in interest Pacific Goodrich Rubber Company.

V.

That the tax sought to be recovered in this action was paid to John P. Carter, the Collector of Internal Revenue for the Sixth District of California; that said John P. Carter died prior to the commencement of this action, to-wit, on or about April 24, 1935; that Nat Rogan succeeded the said John P. Carter as Collector of Internal Revenue for the Sixth District of California and still holds that position.

VI.

That on June 30, 1934, eight thousand (8,000) shares of the capital stock of Pacific Goodrich Rubber Company were issued and outstanding, and none of the shares of said stock were subscribed for but unissued; that at all times on and after June 30, 1934, the number of shares of stock of the Pacific Goodrich Rubber Company which were issued and outstanding remained unchanged; and that at no time on or after June, 1934, were any of said shares subscribed for but unissued. [111]

VII.

That at all times from the date of the first issuance of stock of the Pacific Goodrich Rubber Company up to and including the date of its dissolution all of the stock issued by Pacific Goodrich Rubber

Company was issued in the name of plaintiff or in the name of trustees for the benefit of plaintiff and plaintiff was the owner thereof.

VIII.

That, under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress; May 23, 1933, c. 25, Title I, Sec. 16, 48 Stat. 40; 7 U. S. C. A. Sec. 616), plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, i. e., \$0.044184 per pound; that under Section 9 (a) of said Agricultural Adjustment Act (Sec. 9, 48 Stat. 35; 7 U. S. C. A. Sec. 609), plaintiff's said predecessor in interest was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax, including a floor stocks tax, had been paid under Section 9 (a) or Section 16 (a) of the Agricultural Adjustment Act.

IX.

That on August 1, 1933, plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, held

for sale or other disposition articles processed wholly or in chief value from cotton, to wit, tire fabrics, threads and other materials having a total cotton content of 782,474 pounds, said articles being hereinafter referred to as pro- [112] cessed cotton; that pursuant to Sec. 16 of the Agricultural Adjustment Act and the Regulations of the Secretary of the Treasury established thereunder, the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company, duly prepared and filed with John P. Carter, now deceased the then Collector of Internal Revenue for the Sixth District of California, its return reporting the sale or other disposition of the said processed cotton of 782,474 pounds, and paid to said Collector a tax thereon at the rate of \$0.044184 per pound as duly fixed by the Secretary of Agriculture in the total sum of \$34,648.08. That said tax was paid in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,666.03

That no portion of said tax of \$34,648.08 has been refunded or credited to plaintiff or to plaintiff's predecessor in interest Pacific Goodrich Rubber Company.

X.

That during the period from August 1, 1933, through January 5, 1934, Pacific Goodrich Rubber

Company manufactured and sold tires (exclusive of tax free tires sold to the government for export) which contained 705,806 pounds of the aforementioned 782,474 pounds of processed cotton which were held for sale or other disposition by said company on August 1, 1933. That the other and remaining 76,668 pounds of processed cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires or wasted.

XI.

That in computing the manufacturer's excise tax imposed by Sec. 602 of the Revenue Act of 1932 on the aforementioned tires manufactured and sold by Pacific Goodrich Rubber Company during the period from August 1, 1933, through January 5, 1934, said company deducted from the weight of said tires the weight of the 705,806 pounds of [113] processed cotton contained therein on which it had paid the tax imposed by Sec. 16 of the Agricultural Adjustment Act. That the manufacturer's excise tax so computed was reported by Pacific Goodrich Rubber Company by the filing of manufacturer's excise tax returns with said John P. Carter, deceased, the then Collector of Internal Revenue for the Sixth District of California, and the amount of the tax so computed, to wit, the sum of $2\frac{1}{4}$ cents per pound on the weight of said tires less the weight of the processed cotton contained therein on which the tax imposed by Sec. 16 of the Agricultural Ad-

justment Act had been paid, was paid to said Collector of Internal Revenue.

XII.

That the aforementioned computation of the manufacturer's excise tax was rejected and disallowed by the defendant and John P. Carter, deceased, the then Collector of Internal Revenue, and on or about April 10, 1934, demand was made upon the Pacific Goodrich Rubber Company by the defendant and said Collector of Internal Revenue for the payment of additional manufacturer's excise tax in the sum of \$15,880.64, together with interest thereon in the sum of \$569.74, which interest was assessed against said company on June 9, 1934; that said additional manufacturer's excise tax demanded of said Pacific Goodrich Rubber Company was a tax of $2\frac{1}{4}$ cents per pound on the 705,806 pounds of processed cotton on which said company had paid the tax imposed by Sec. 16 of the Agricultural Adjustment Act, and the weight of which, for the purpose of computing the manufacturer's excise tax, was deducted by said company from the weight of the tires manufactured and sold by it during the period from August 1, 1933, through January 5, 1934. That in response to said demand said additional manufacturer's excise tax of \$15,880.64 was paid by the Pacific Goodrich Rubber Company on or about April 18, 1934, and the interest thereon of \$569.74 was paid by the Pacific Goodrich Rubber Company on or about July 27, 1934. That said payments were

made under written protest and solely for the purpose of avoiding [114] penalties and interest, and said Collector of Internal Revenue was so advised at the time of payment. That the defendant and said Collector of Internal Revenue in arriving at the amount of the additional manufacturer's excise tax and the interest thereon to be demanded of the Pacific Goodrich Rubber Company determined for their convenience that the additional tax should be demanded for the months of November and December, 1933, and the Pacific Goodrich Rubber Company did not object to this action if demand for an additional manufacturer's excise tax was to be made but did object to any additional taxes being demanded.

XIII.

On July 6, 1934 the Board of Directors of Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XIV.

On July 6, 1934 the stockholders of the Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XV.

On August 24, 1934 the Board of Directors of Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XVI.

On June 30, 1934 the Pacific Goodrich Rubber Company executed an assignment to the plaintiff, a true copy of which assignment appears on page three of plaintiff's "First Amended Petition."

XVII.

On August 14, 1935 the Pacific Goodrich Rubber Company executed an assignment to plaintiff, a true copy of which assignment appears on pages four and five of plaintiff's "First Amended Petition."

XVIII.

That on or about August 31, 1935, each the plaintiff and the [115] Pacific Goodrich Rubber Company filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of California, a claim for refund dated August 19, 1935, of the additional manufacturer's excise tax and interest thereon in the aggregate sum of \$16450.39 which was paid by the Pacific Goodrich Rubber Company under protest as described in paragraph XII above. That each of said claims was made upon the ground alleged therein that under Sec. 9 of the Agricultural Adjustment Act the taxpayer in computing the manufacturer's excise tax on the tires manufactured and sold by it was entitled to deduct from the weight of said tires the weight of the processed cotton therein on which it had paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act; that as an additional reason for the

allowance of the plaintiff's claim, it was alleged therein that the plaintiff was entitled to the refund claimed by reason of the aforementioned assignment of June 30, 1934, from Pacific Goodrich Rubber Company, which assignment is described in paragraph XVI above.

XIX.

That on or about April 21, 1936, each the plaintiff and the Pacific Goodrich Rubber Company filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of California, an amended claim for refund dated March 30, 1936, of the same tax and interest as that the refund of which was claimed in their original claims for refund described in paragraph XVIII above. That each of said amended claims for refund alleged the same grounds for its allowance as those alleged in the original claims for refund, and each alleged in addition the further reason for its allowance that the taxpayer did not include the tax, the refund of which was claimed, in the price of the articles on which said tax was imposed, nor did it collect the amount of said tax from the persons to whom said articles were sold. [116]

XX.

That on May 22, 1936 the Commissioner of Internal Revenue by letter addressed to the plaintiff rejected in full both the original and amended claims for refund of the plaintiff on the ground that there

was on file in his office a claim filed by the Pacific Goodrich Rubber Company for refund of the same tax, based on the same contentions, and that the plaintiff's claims were therefore duplicate claims. That on April 8, 1936, the Commissioner of Internal Revenue rejected the original claim for refund of the Pacific Goodrich Rubber Company, and on May 22, 1936, by letter addressed to the Pacific Goodrich Rubber Company said Commissioner rejected in full the amended claim for refund of said company. That said rejections of the claims of the Pacific Goodrich Rubber Company were made on the grounds that the proper interpretation of Sec. 9 (a) of the Agricultural Adjustment Act did not entitle said company to a credit for the floor stocks tax paid on the cotton contents of tires in computing the manufacturer's excise tax. That neither the whole or any part of said additional manufacturer's excise tax and interest in the aggregate sum of \$16,450.39, which was paid by the Pacific Goodrich Rubber Company under protest as aforesaid, has been repaid or refunded to the plaintiff or to the Pacific Goodrich Rubber Company, and no other action than the filing of said claims for refund and the bringing of this action has been brought or taken by the plaintiff or the Pacific Goodrich Rubber Company for the recovery of said tax and interest.

XXI.

That on July 8, 1936, the plaintiff filed with the Collector of Internal Revenue at Akron, Ohio, a

claim for abatement of certain taxes and interest having no relation to the taxes and interest involved in this proceeding, but in which the plaintiff described itself as the successor to the Pacific Goodrich Rubber Company, and in which it made the statement that Pacific Goodrich Rubber Company transferred its assets to The B. F. Goodrich Company on or about June [117] 30, 1934, and was dissolved December 31, 1934.

XXII.

That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9 (a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9 (a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled

to pay an additional manufacturer's excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer's excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.)

XXIII.

That J. C. Herbert, Secretary of the Pacific Goodrich Rubber Company, during the tax period involved herein, testified as appears [118] on pages two and three of the "Stipulation of Facts" on file herein; that George Hubbell, Assistant Treasurer of plaintiff, testified as appears on pages three, four, five, six, seven, eight, nine and ten of plaintiff's "Stipulation of Facts" on file herein.

CONCLUSIONS OF LAW

I.

That the tax imposed by Sec. 602 of the Revenue Act of 1932 on tires is a manufacturer's sales tax within the meaning of the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act; that under said Sec. 9 (a) of the Agricultural Adjustment Act the manufacturer's excise tax on tires imposed by Sec. 602 of the Revenue Act of 1932 should be computed on the basis of the weight of said tires, less the weight of the processed cotton therein on which either a processing tax imposed by Sec. 9 (a) of the Agricultural Adjustment Act or a floor stocks tax imposed by Sec. 16 (a) of said Act has been paid; that it was the intention of Congress by the use of the words "processing tax" in the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act to refer not only to the tax imposed by Sec. 9 (a) of said Act, but to the so-called floor stocks tax imposed by Sec. 16 (a) of said Act; that under Sec. 9 (a) of the Agricultural Adjustment Act the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company, was entitled to compute the manufacturer's excise tax on the tires sold by it during the period from August 1, 1933, through January 5, 1934, by deducting from the weight of said tires the weight of the processed cotton contained therein on which a floor stocks tax imposed by Sec. 16 of the Agricultural Adjustment Act had been paid.

II.

That the tax, the refund of which is sought in this action, is a manufacturer's excise tax erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company; that apart from the right of said company under the applicable revenue laws to a refund of the wrongfully demanded and collected excess taxes, it is entitled as the taxpayer to such refund under the equitable remedy of [119] money had and received.

III.

That this is not an action for the recovery of floor stocks taxes collected by the defendant under the provisions of the Agricultural Adjustment Act, and that the administrative procedure under Sec. 902 et seq. of the Revenue Act of 1936 is, therefore, inapplicable.

IV.

That the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act relating to the computation of the manufacturer's excise tax was valid and constitutional, and that it was not rendered invalid or unconstitutional, nor was the right to a refund of the additional manufacturer's excise tax, the refund of which is sought in this action, nullified by the invalidity and unconstitutionality of other provisions of that act; that in any event the tax, the refund of which is sought in this action, is

not a floor stocks tax imposed under the Agricultural Adjustment Act, but is a manufacturer's excise tax having only an indirect relation to the levy of such floor stocks tax.

V.

That the right to the refund of the tax which is sought to be recovered in this action was not acquired by the plaintiff by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to plaintiff, but vested in plaintiff by reason of the two written assignments executed by the Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively. That said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes and the plaintiff accordingly acquired no rights thereunder to the refund of the tax herein sought to be recovered. That the plaintiff [120] also acquired no right to the refund of the tax herein sought to be recovered by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by dissolution of that company or by the distribution in kind by said company of all of its assets to the plaintiff.

VI.

That under Sec. 621 (d) of the Revenue Act of 1932 only "the person who paid the tax" can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932.

VII.

That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Sec. 621 (d) of the Revenue Act of 1932.

VIII.

That plaintiff should recover nothing against defendant and that defendant should have and recover of and from the plaintiff judgment for its costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: August 2nd, 1941, at 3 P. M.

PAUL J. McCORMICK,

United States District Judge.

Approved as to form.

.....
Attorneys for plaintiff.

[Endorsed]: Filed Aug. 4, 1941. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [121]

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 8138-M Civil

THE B. F. GOODRICH COMPANY, a corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly for trial on February 10, 1940, plaintiff being represented by F. C. Leslie, Esquire, and Eugene H. Blanche, Esquire, and defendant being represented by the United States Attorney for the Southern Judicial District of California, through Armond Monroe Jewell, Assistant United States Attorney, and evidence having been offered to and received by the Court, and the cause ordered submitted upon the filing of briefs in behalf of each party, and the said briefs having been filed, and this Court having drawn and filed its "Conclusions of the Court on the Merits of the Action", and plaintiff, by its attorneys Newlin & Ashburn, through Ray J. Coleman, Esquire, having moved to reopen the case to admit further proof, and said motion having been opposed by defendant through its attorney above

named, and the Court having denied plaintiff's said motion to re-open the case to admit further proof, and the Court, after consideration of proposed findings of fact and conclusions of law submitted by respective attorneys and having made its findings of fact and conclusions of law, and filed the same herein.

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that plaintiff take nothing by its complaint, that the same be and hereby is dismissed and defendant have judgment for its costs taxed in the sum of \$20.00.

Dated: August 2nd, 1941, at 3:10 P. M.

PAUL J. McCORMICK,

United States District Judge.

Approved as to form.

.....
Attorneys for plaintiff.

Judgment entered Aug. 4, 1941.

Docketed Aug. 4, 1941.

Book C. O. 6, Page 129.

R. S. Zimmerman, Clerk.

By B. B. Hansen, Deputy.

[Endorsed]: Filed Aug. 4, 1941. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [122]

[Title of District Court and Cause.]

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original Judgment entered in the above-entitled cause and recorded in C. O. Book 6—Central Division at page 129 thereof; and I do further certify that the papers hereto annexed constitute the Judgment Roll in said cause.

Attest my hand and the seal of said District Court, this Oct. 3, 1941.

R. S. ZIMMERMAN,
Clerk.

By B. B. HANSEN,
Deputy Clerk.

(Court Seal) [123]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION
RE EXHIBITS

It Is Hereby Stipulated And Agreed by and between the parties hereto by their respective attorneys, as follows:

1. That Plaintiff's Exhibit "F", being a claim for refund dated August 19, 1935, (referred to in page 6, line 9 of Transcript) is Exhibit "D" referred to in line 20, page 8 of the Stipulation of Facts in the above entitled matter.

2. That Plaintiff's Exhibit "G", being the amended claim for refund of The B. F. Goodrich Company (line 13, page 9 of Transcript) is the exhibit referred to as Exhibit "E", line 29 page 8 of said Stipulation of Facts.

3. That Plaintiff's Exhibits "H-1" and "H-2", being letters addressed to The B. F. Goodrich Company and signed by Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner, (lines 22, 24, 25 and 26, page 9 of Transcript), and Plaintiff's Exhibit "H-3" (line 2, page 10 of Transcript) is Exhibit "F" referred to in line 6, page 9 of said Stipulation of Facts.

Dated: March 9th, 1940.

EUGENE H. BLANCHE,

F. C. LESLIE,

Attorneys for Plaintiff.

BEN HARRISON,

United States Attorney,

By ARMOND MONROE JEWELL,

Assistant United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed May 28, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [124]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Com-

pany, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, heretofore set for April 4th, 1938, may be continued to the 6th day of June, 1938, at 10 o'clock A. M., before the Honorable Paul J. McCormick.

Dated: April 4th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By FRANCIS C. WHELAN,
Assistant United States
Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 8, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk. [125]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Company, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, here-

tofore set for June 13th, 1938, may be continued to the 19th day of Sept., 1938, at 10 o'clock A. M., before the Honorable Paul J. McCormick.

Dated: June 9th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By FRANCIS C. WHELAN,
Assistant United States
Attorney,
Attorneys for Defendant

[Endorsed]: Filed Jun. 13, 1938. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [126]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Company, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, heretofore set for the 1st day of August, 1938, may be continued to the 3rd day of October, 1938, at 10

o'clock A. M., before the Honorable Paul J. McCormick.

Dated: July 28th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,

United States Attorney,

By ARMOND MONROE JEWELL,
Assistant United States
Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 1, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [127]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
DEFENDANT'S BRIEF

It is hereby stipulated by and between the parties hereto, through their respective counsel, that defendant may have to and including June 3, 1940 within which to file its brief in the above entitled case.

Dated this 20 day of May, 1940.

EUGENE H. BLANCHE

By EUGENE H. BLANCHE

Attorneys for Plaintiff

BEN HARRISON

United States Attorney

EDWARD H. MITCHELL

Asst. U. S. Attorney

ARMOND MONROE JEWELL

Asst. U. S. Attorney

By ARMOND MONROE JEWELL

Attorneys for Defendant

It is so ordered this 28 day of May, 1940.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed May 28, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [128]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
PLAINTIFF'S REPLY BRIEF

It is hereby stipulated by and between the parties hereto, through their respective counsel, that plaintiff may have to and including July 10, 1940, within which to file its reply brief in the above entitled matter.

Dated: this 11th day of June, 1940.

EUGENE H. BLANCHE

By EUGENE H. BLANCHE
Attorney for Plaintiff

BEN HARRISON,
United States Attorney

EDWARD H. MITCHELL,
Asst. U. S. Attorney

ARMOND MONROE JEWELL,
Asst. U. S. Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant

It is so ordered this 17th day of June, 1940.

PAUL J. McCORMICK,
Judge

[Endorsed]: Filed Jun. 17, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [129]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
PLAINTIFF'S REPLY BRIEF

It is hereby stipulated by and between the parties hereto, through their respective counsel, that Plaintiff may have to and including July 24th, 1940, within which to file its Reply Brief in the above entitled matter.

Dated this 9th day of July, 1940.

EUGENE H. BLANCHE,
By EUGENE H. BLANCHE,

BEN HARRISON,
United States Attorney

EDWARD H. MITCHELL,
Asst. U. S. Attorney

ARMOND MONROE JEWELL,
Asst. U. S. Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant.

It is so ordered this 10th day of July, 1940.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jul. 11, 1940. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[130]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements

Marshal's Fees.....	\$
Clerk's Fees	10.00
Witness' Fees	
Attorney's Docket Fees (Sec. 824	
R. S.) (Sec. 571-2 Title 28	
U. S. C.).....	10.00

\$20.00

Taxed J.M.H.

United States of America,
Southern District of California,
City of Los Angeles—ss.

Armond Monroe Jewell, being duly sworn, deposes and says: that he is one of the attorneys for Defendant in the above entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that said disbursements have been necessarily incurred in said cause; and that the services charged herein have been actually and necessarily performed as herein stated.

(Seal)

ARMOND MONROE JEWELL,
Assistant United States Attorney

Subscribed and sworn to before me, this 8th day of August, A. D. 1941.

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern

District of California

By J. M. HORN,

Deputy. [131]

To Newlin and Ashburn

You will please take notice that on Monday the 11th day of August, A. D. 1941, at the hour of 9:00 o'clock A. M., defendant will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

ARMOND MONROE JEWELL,

Assistant United States Attorney

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged this day of, A. D. 193.....

.....
Attorney for

[Endorsed]: Filed Aug. 8, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [132]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Lois Hamby, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 600 Federal Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on August 8, 1941 she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Memorandum of Costs and Disbursements addressed to Newlin & Ashburn, 1020 Edison Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

LOIS HAMBY

Subscribed and sworn to before me, this 8th day of August, 1941.

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern
District of California

By J. M. HORN,

(Court Seal) Deputy.

[Endorsed]: Filed Aug. 8, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that The B. F. Goodrich Company, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 4, 1941.

Dated: November 3, 1941.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for Plaintiff

1020 Edison Building,

Los Angeles, Calif.

[Endorsed]: Copy mailed to U. S. Atty. E. L. S. Filed Nov. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [134]

[Title of District Court and Cause.]

STIPULATION IN RE RECORD ON APPEAL

Whereas, the parties hereto have agreed that more than forty days will be required to prepare and file the record on appeal in the above entitled cause; and

Whereas, the plaintiff in the above entitled action has heretofore duly and regularly taken and perfected an appeal from the judgment heretofore made and entered herein in favor of defendant and against plaintiff;

Now, therefore, it is hereby stipulated that the time of said plaintiff and appellant to take steps for the preparation of a record on appeal in accordance with Rule 75 of the Rules of Civil Procedure may be by order of this court extended to and including the 15th day of January, 1942, and the time of said defendant and appellant to file the record on appeal and to docket said action on appeal may be by order of this court extended to [136] and including the 25th day of January, 1942.

Dated, this 29th day of November, 1941.

WILLIAM FLEET PALMER,
United States Attorney

ARMOND MONROE JEWELL,
Assistant United States Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant and
Respondent

NEWLIN & ASHBURN,
By WILLIAM J. CURRER, JR.,
Attorneys for Plaintiff and
Appellant

It is hereby ordered that the time of appellant The B. F. Goodrich Company, a corporation, to commence the preparation of a record on appeal is hereby extended to and including January 15, 1942, and its time to file the record on appeal and to docket said action on appeal is hereby extended to and including January 25, 1942, in accordance with the foregoing stipulation.

Dated, November 29th, 1941.

PAUL J. McCORMICK,
District Judge

[Endorsed]: Filed Nov. 29, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [137]

[Title of District Court and Cause.]

Know All Men by These Presents:

That we, The B. F. Goodrich Company, a corporation, as Principal, and American Surety Company of New York, a corporation under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty and no/100 Dollars (\$250.00) to be paid to the United States of America, or its certain attorney, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of November, in the year of our Lord One Thousand Nine Hundred and Forty-one.

Whereas, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit pending in said Court between The B. F. Goodrich Company, a corporation, Plaintiff, versus the United States of

America, Defendant, a judgment was rendered against the said The B. F. Goodrich Company, a corporation, and the said The B. F. Goodrich Company, a corporation, having filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said The B. F. Goodrich Company, a corporation, shall prosecute its appeal to effect, and answer all costs if it fails to make its plea good, or if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

THE B. F. GOODRICH COMPANY

By G. W. HUBBELL

Asst. Treas.

AMERICAN SURETY COMPANY
OF NEW YORK

By A. E. KRULL

Resident Vice President

Attest:

I. TAYLOR

Resident Assistant Secretary

Examined and recommended for approval as provided by Rule 13.

RAY J. COLEMAN

Attorney [138]

State of California,
County of Los Angeles—ss.

On this 3d day of November, A. D. 1941, before me, Lucile M. Chesley, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull personally known to me to be the Resident Vice-President and I. Taylor, personally known to me to be the Resident Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires April 16, 1945.

[Endorsed]: Filed Nov. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [139]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Now comes The B. F. Goodrich Company, a corporation, the plaintiff and appellant herein, and designates for inclusion in the record to be filed in the Circuit Court of Appeals for the Ninth Circuit pursuant to the appeal taken in the above entitled action, the complete record and all the proceedings and evidence in said action including the following:

1. Petition filed herein on October 1, 1937.
2. Affidavit of service of petition by mailing, filed herein on October 6, 1937.
3. Affidavit of service of petition, filed herein on October 6, 1937.
4. Demurrer filed herein on December 3, 1937.
5. Amendment to demurrer, filed herein on April 6, 1938.
6. Amendment to petition, filed herein on May 21, 1938. [140]
7. Order that petition be amended as set forth in the aforementioned amendment to petition, said order being filed herein on May 21, 1938.
8. Second amendment to demurrer, filed herein on August 1, 1938.
9. Notice of motion for order sustaining demurrer, filed herein on August 8, 1938.

10. Minute order overruling demurrer, made on or about October 3, 1938.

11. Answer filed herein on February 3, 1939.

12. Affidavit of service of answer by mail, filed herein on February 3, 1939.

13. First amended petition, filed herein on February 5, 1940.

14. Stipulation as to filing first amended petition by plaintiff and that answer of defendant to petition as amended be the answer to the first amended petition, said stipulation being filed herein on February 5, 1940.

15. Substitution of attorneys, filed herein on February 10, 1940.

16. Stipulation of facts, filed herein on February 10, 1940.

17. Minute order submitting cause for decision on briefs, made on or about February 10, 1940.

18. Conclusions of the court on the merits of the action, filed herein on December 31, 1940.

19. Minute order on decision of action on the merits, filed herein on December 31, 1940.

20. Substitution of attorneys, filed herein on February 3, 1941.

21. Notice of motion to reopen case to admit further proof, together with the memorandum of authorities and the [141] affidavits attached thereto, said notice of motion being filed herein on February 3, 1941.

22. Affidavit of Armond Monroe Jewell in opposition to motion to reopen, filed herein on April 14, 1941.

23. Minute order denying motion to reopen, filed herein on April 15, 1941.

24. Findings of fact and conclusions of law dated August 2, 1941, and filed herein on August 4, 1941.

25. Judgment dated August 2, 1941, and filed herein on August 4, 1941.

26. Certificate dated October 3, 1941, of B. B. Hansen, Deputy Clerk of the above entitled court, certifying to the judgment and to the contents of the judgment roll.

27. All of the plaintiff's exhibits, consisting of Exhibits A, B, C, D, E, F, G, H-1, H-2, H-3, I, I-1 and J.

28. All of defendant's exhibits, consisting of Exhibits Nos. 1, 2, 3 and 4.

29. Reporter's transcript, two copies of which are filed herewith. The original was filed with the above entitled court on or about February 20, 1940, and at that time a copy was also furnished to defendant's counsel.

30. Supplemental stipulation re exhibits, filed herein on May 28, 1940.

31. Brief of plaintiff, defendant's reply brief and plaintiff's reply brief, all of which were filed with the above entitled court and all of which are deemed necessary for the proper presentation of the points on which appellant

intends to rely for the following reasons: (1) Pursuant to stipulation of counsel in open court (Rep. Tr. p. 6) that certain objections to stipulated testimony might be made in said briefs, counsel for de- [142] fendant at page 14 of defendant's reply brief objected to portions of this testimony and this objection was erroneously sustained by the court on page 12 of its conclusions of the court on the merits of the action. (2) One of the grounds urged by plaintiff and appellant for the granting of the motion to reopen was that the further evidence sought to be introduced related in part to defenses which the plaintiff with good cause did not anticipate, since they were not urged by the Commissioner of Internal Revenue in advance of trial or by the defendant at time of trial and were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted. Said briefs, together with the reporter's transcript, must therefore be reviewed by the Appellate Court to determine what defenses were urged by the defendant and what defenses were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted.

32. Stipulation continuing hearing on demurrer, filed herein on April 8, 1938.

33. Stipulation continuing hearing on demurrer, filed herein on June 13, 1938.

34. Stipulation continuing hearing on demurrer, filed herein on August 1, 1938.

35. Stipulation extending time to file defendant's brief, filed herein on May 28, 1940.

36. Stipulation extending time to file plaintiff's reply brief, filed herein on June 17, 1940.

37. Stipulation extending time to file plaintiff's reply brief, filed herein on July 11, 1940.

38. Memorandum of costs and disbursements, filed herein on August 8, 1941.

39. Affidavit of service by mail of cost bill, filed herein on August 8, 1941. [143]

40. Notice of appeal filed herein on November 3, 1941.

41. Stipulation in re record on appeal together with the order of the court dated November 29, 1941, extending the time to file the record on appeal and to docket this action, said stipulation and order being filed herein on November 29, 1941.

42. Bond for costs on appeal.

43. This designation of the contents of record on appeal.

Said transcript is to be prepared by the clerk of this court as required by law and the rules of this court and the Federal Rules of Civil Procedure, and to be filed in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit and this action there docketed on or before the 25th day of January, 1942, pursuant to the order of the

above entitled court made herein on the 29th day of November, 1941, extending the time within which to file the record on appeal and to docket this action.

Dated, this 14th day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for The B. F. Goodrich Company,
plaintiff and appellant

[Endorsed]: Received copy of the within Designation this 14 day of Jan. 1942. A. M. Jewell, Asst. U. S. Atty., Attorney for Deft. Filed Jan. 14, 1942.

[Endorsed]: Filed Jan. 14, 1942. [144]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME TO FILE RECORD ON APPEAL
AND DOCKET ACTION

This court, upon the stipulation of counsel for plaintiff and defendant, having heretofore made its order herein extending the time to commence the preparation of the record on appeal to and including January 15, 1942, and extending the time to file the record on appeal and to docket this action in the Appellate Court to and including January 25, 1942; and

The plaintiff and appellant, The B. F. Goodrich

Company, a corporation, having filed with the clerk of this court on January 14, 1942, its designation of contents of record on appeal; and

The clerk of this court having advised counsel for plaintiff and appellant that he will not be able to prepare the transcript of the record on appeal in time to have the same filed in the Appellate Court before the expiration of the period for filing and docketing as extended by the aforementioned order of this court; [146]

Now, therefore, it is hereby stipulated by and between counsel for plaintiff and defendant above named, that the time of plaintiff and appellant for filing the record on appeal and for docketing this action in the Circuit Court of Appeals for the Ninth Circuit may be, by order of this court, extended to and including the 31st day of January, 1942.

Dated this 21 day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for Plaintiff and Appellant,
The B. F. Goodrich Company.

WILLIAM FLEET PALMER,

United States Attorney,

ARMOND MONROE JEWELL,
Assistant United States Attorney,

By ARMOND MONROE JEWELL
Attorneys for defendant and Respondent, United States of America.

Upon the foregoing stipulation of counsel for plaintiff and defendant in the above entitled cause, and good cause appearing therefor,

It is hereby ordered that the time of the plaintiff and appellant for filing the record on appeal and for docketing this action in the Appellate Court be and it hereby is extended to and including the 31st day of January, 1942.

Dated: this 22nd day of January, 1942.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jan. 22, 1942. [147]

[Title of District Court and Cause.]

ORDER THAT ORIGINAL PAPERS AND EXHIBITS BE SENT TO APPELLATE COURT

It being the opinion of this court that upon the appeal of this action to the Circuit Court of Appeals for the Ninth Circuit, it is desirable that certain original papers and exhibits should be sent to said Appellate Court in lieu of copies thereof,

Now, therefore, it is hereby ordered that the following listed original papers and exhibits, which are designated in items 27, 28 and 31 of appellant's designation of contents of record on appeal filed herein on January 14, 1942, be transmitted, in lieu of copies, by the clerk of this court to the clerk of the Circuit Court of Appeals for the Ninth Cir-

cuit to be by him safely kept and returned to the clerk of this court after the disposition of said appeal:

1. All of plaintiff's exhibits consisting of Exhibits "A", "B", "C", "D", "E", "F", "G", "H-1", "H-2", "H-3", "I", "I-1" and "J"; [149]

2. All of defendant's exhibits consisting of Exhibits Nos. 1, 2, 3 and 4;

3. Briefs as described in Item 31 of appellant's designation of contents of record on appeal filed herein on January 14, 1942.

Dated this 22nd day of January, 1942.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jan. 22, 1942. [150]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 151 inclusive contain full, true and correct copies of Petition; Affidavit of Service of Petition by Mail; Affidavit of Service of Petition; Demurrer; Amendment to Demurrer; Amendment to Petition; Order for Amendment of Petition; Second Amendment to Demurrer; Notice

of Motion for Order Sustaining Demurrer; Order Overruling Demurrer; Answer to Petition; Affidavit of Service of Answer; First Amended Petition; Stipulation as to Filing First Amended Petition and re Answer thereto; Substitution of Attorneys filed Feb. 10, 1940; Stipulation of Facts; Order Submitting Cause; Conclusions of Court on Merits; Order for Findings and Judgment; Substitution of Attorneys filed Feb. 3, 1941; Notice of Motion to Reopen Case and Memorandum of Authorities and Three Affidavits Annexed thereto; Affidavit of Armond Monroe Jewell in Opposition to Motion to Reopen; Order Denying Motion to Reopen; Findings of Fact and Conclusions of Law; Judgment; Certificate of Clerk to Judgment Roll; Supplemental Stipulation re Exhibits; Three Stipulations Extending Time to File Briefs; Three Stipulations Continuing Hearing on Demurrer; Memorandum of Costs and Disbursements; Affidavit of Service of Cost Bill; Notice of Appeal; Bond for Costs on Appeal; Designation of Record on Appeal; Two Stipulations and Orders Extending Time to Docket Appeal; Order for Transmittal of Original Briefs and Exhibits, which together with the Reporter's Transcript of Testimony and Proceedings, the Brief of Plaintiff, Defendant's Reply Brief, Plaintiff's Reply Brief and the Original Exhibits transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for

comparing, correcting and certifying the foregoing record amount to \$26.95, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 29th day of January, A. D. 1942.

(Seal) R. S. ZIMMERMAN,
Clerk,
By: EDMUND L. SMITH,
Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

Appearances:

For the Plaintiff:

EUGENE H. BLANCHE, Esq.,
1117 Transamerica Building,
Los Angeles, California; and
F. C. LESLIE, Esq.,

For the Defendant:

BEN HARRISON,
United States Attorney; and
ARMOND MONROE JEWELL,
Assistant United States Attorney.

Los Angeles, California

Saturday, February 10, 1940—10:05 o'clock A. M.

The Court: Proceed.

The Clerk: No. 8138, The B. F. Goodrich Company versus the United States, for trial.

Mr. Jewell: Ready, your Honor.

Mr. Blanche: Ready.

The Court: Proceed.

Mr. Blanche: At this time, if the Court please, I wish to file a substitution of attorneys, substituting Eugene H. Blanche in lieu and instead of Messrs. Andrews, Blanche & Kline.

The Court: So ordered.

Mr. Blanche: Substitution has been served upon counsel for the Government.

I wish also at this time to associate in the trial of this matter, in behalf of The B. F. Goodrich Company, Mr. F. C. Leslie.

The Court: Mr. Leslie is a member of the bar of an outside jurisdiction——

Mr. Blanche: Mr. Leslie is a member of the bar of Ohio and Tennessee in the Sixth and Seventh Circuit and of the United States Supreme Court.

The Court: He is merely appearing in this case, and not permanently.

Mr. Blanche: Yes, he is. He did appear once before under the same conditions in an argument on a demurrer.

The Court: Very well.

Mr. Blanche: I may say that in this matter we have reduced practically every question to an agreed stipulation. There are one or two exceptions to that, and we will make that clear as we proceed.

It had been the thought of counsel that this matter be submitted on brief, probably 20, 20 and 10, and if your Honor wishes, at this time we are pre-

pared to make a brief opening statement of the situation, the contentions of the plaintiff and of the law involved.

The Court: I think it would be well to do that.

Mr. Blanche: Very well.

Mr. Leslie: If the Court please, this action is one for the recovery of additional manufacturers excise tax paid by the Pacific Goodrich Company in 1934. The original petition was filed in 1937, and a demurrer was filed on behalf of the Government. We argued that demurrer before your Honor, and that was overruled in October 1938.

The question raised by that demurrer was whether or not the tax sought to be recovered here was really an agriculture adjustment tax, namely, a floor stock or processing tax, rather than a manufacturing excise tax.

The question involved here is a construction of Section 9 (b) of the Agricultural Adjustment Act. Your Honor will probably recall the Revenue Act of 1932 assessed a manufacturers' excise tax on tires of $2\frac{1}{4}$ cents per pound.

In 1933, when the Agricultural Adjustment Act was passed, Section 9 (b) of that act provided for a credit to manufacturers of tires on the manufacturers' excise tax for the amount of cotton going into the tires upon which a processing tax had been paid.

The language of that Act is as follows:

“Provides: That any article upon which a manufacturers' sales tax is levied under the

authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight"—and that is true in the tires—"such manufacturers' sales tax shall be computed on the basis of the weight of such finished article, less the weight of the processed cotton contained therein on which a processing tax has been paid."

Your Honor will possibly also recall that the Agricultural Adjustment Act levied three types of taxes, or three divisions of taxes, all generally grouped under the processing tax.

First, was the tax which was to be paid on the processing of cotton after August 1, 1933, that being the effective date of the act.

Secondly, a floor stock tax which was to be paid at the same rate and on the same commodities but on the inventory on hand as of August 1, 1933.

Now, that second tax is commonly referred to by the Commissioner's office and by taxpayers as a floor stock tax.

The question involved is whether or not the words "processing tax," as used in the section which I just read to your Honor, includes floor stock tax as well as processing tax.

We contend that it must, otherwise there is such a discrimination there that Congress couldn't have intended anything other than that.

That is our contention.

Mr. Jewell: In addition to the contention referred to by counsel for the plaintiff, as to the

fact that the Government contends that the words "processing tax," giving that construction, do not include floor stock taxes, there is also another contention on the part of the Government, and that is that this is really an action for the recovery of taxes paid under the Agricultural Adjustment Act, and that the plaintiff has not conformed with the rules and regulations laid down by the statute in a suit for such a refund.

The Court: Proceed.

Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

By stipulation of counsel for the Government, there will be no question of a foundation raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.

We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.

It is our contention, of course, that inasmuch as the tax was not levied until some four months after the return, we were not apprised of it, we did not include it in the price of the commodity, and there is a statement to the effect that it was not covered with subsequent billing.

This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

Is that a correct statement, Mr. Jewell——

Mr. Jewell: That is a correct statement.

The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

Mr. Blanche: Yes, your Honor.

I do not believe it is in order to make this as an exhibit; I therefore offer it in evidence.

The Court: It may be filed.

Mr. Blanche: As a part of the pleadings——

The Court: Yes.

(The stipulation referred to was filed as a part of the pleadings.)

Mr. Blanche: We have a series of exhibits, if the Court please.

We will pass by Exhibit A for the reason that it arrived this morning from Akron and is being photostated. The original has not as yet been ex-

hibited to counsel for the Government, but it will be forwarded here as soon as we can photostat it. Therefore, I ask that the assignment dated June 30, 1934, from Pacific Goodrich Rubber Company to The B. F. Goodrich Company be introduced in evidence and marked as Plaintiff's Exhibit A. This will be furnished before adjournment of Court.

The Court: So ordered.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit A.")

PLAINTIFF'S EXHIBIT A

ASSIGNMENT

Know all men by these presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank

accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal

to be affixed hereto by its President and Secretary
as of the 30th day of June, 1934.

PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW
President,

Attest:

S. M. JETT
Secretary

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said county, personally appeared J. D. Tew, President and S. M. Jett, Secretary of Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said The Pacific Goodrich Rubber Company.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 30th day of June, 1934.

ALBERTA H. TEWERS
Notary Public

My commission expires Dec. 15, 1935.

Mr. Blanche: I next offer in evidence an assignment dated August 14, 1935, from Pacific Goodrich Rubber Company to The B. F. Goodrich Company, the same being marked Exhibit B.

I may say, if the Court please, that copies of all of these exhibits, with the exception of Exhibit A which I have referred to, has already been furnished to, or examined by, counsel for the Government.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit B.")

PLAINTIFF'S EXHIBIT B

For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon.

The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and

particularly, said claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

In witness whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW

President

By S. M. JETT

Secretary

F. C. LESLIE

F. M. SEIFERT

State of Ohio,

County of Summit—ss.

Before me, a Notary Public in and for said county, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its

board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said the Pacific Goodrich Rubber Company.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio this 14th day of August, 1935.

ALBERTA M. TEWERS

Notary Public

My Commission expires Dec. 15, 1935.

Mr. Blanche: We next offer in evidence Plaintiff's Exhibit C, demand on Form 728 from the United States of America, addressed to Pacific Goodrich Rubber Company, for the sum of \$15,-880.64, plus interest of \$569.74.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit C.")

MANUFACTURER'S EXCISE TAXES

Section 6101, Internal Revenue Act of 1921.
Section 6102, Internal Revenue Act of 1922.

CHARACTER OF TAX	RATE	AMOUNT OF TAX
1. Taxes on tobacco	24%	15,880.64
2. Taxes on liquors	4%	
3. Taxes on distilled liquors	10%	
4. Taxes on fermented liquors	10%	
5. Taxes on beer	10%	
6. Taxes on wine	10%	
7. Taxes on spirits	10%	
8. Taxes on cigars	10%	
9. Taxes on cigarettes	10%	
10. Taxes on matches	10%	
11. Taxes on playing cards	10%	
12. Taxes on amusements	10%	
13. Taxes on amusements	10%	
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97. Taxes on amusements	10%	
98. Taxes on amusements	10%	
99. Taxes on amusements	10%	
100. Taxes on amusements	10%	

Name **Pacific Goodrich Rubber Co**
 No. and Street **10521**
 City and State **Los Angeles Calif**
 Excess at - **62.52**

Signed *[Signature]*
 Date **April 30, 1934**

Storn to and subscribed **April 30, 1934**

(State of California, individual owner of business, number of firm, or if officer of corporation or partnership, name of corporation or partnership, and title)

(Title or Name)

IMPORTED TO THE U.S. AND EXCISE TAXES SHOULD BE SENT TO THE COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CALIFORNIA, SAN FRANCISCO, CALIF. IF YOU HAVE ANYTHING TO REPORT, please send it to the Collector of Internal Revenue, District of California, San Francisco, California. If you have any other business, please send it to the Collector of Internal Revenue, District of California, San Francisco, California. If you have any other business, please send it to the Collector of Internal Revenue, District of California, San Francisco, California.

PLAINTIFF'S EXHIBIT C

To be pasted to back of return) **Apr 30 1934**

Month **April 30, 1934**

(Name) **Pacific Goodrich Rubber Co**
 (Address) **Los Angeles Calif**

Schedule of taxes, penalties, and interest for the several months covered by the attached return.

Month	Tax Due	Tax Paid	Additional Tax	25% Penalty	Over-payment	Interest
1932						
Nov 30		4433.10				339.59
Dec 30		6447.54				193.43
		15,880.64				569.75
Interest computed to include April 30, 1934						
1934						
Jan 31						339.59
Feb 28						167.67
Mar 31						569.75
Apr 30						
Total						

569.75
 507.23
 62.52 excess

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit D, claim for refund of Pacific Goodrich Rubber Company bearing date of August 19, 1935.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit D.")

PLAINTIFF'S EXHIBIT D

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Received Aug. 31, 1935. Collector Internal Revenue, Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [x] Refund of Tax Illegally Collected.
- [] Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.
- [] Abatement of Tax Assessed (not applicable to
estate or income taxes).

State of Ohio,
County of Summit—ss.

Name of taxpayer or purchaser of stamps—Pacific Goodrich Rubber Company.

Business address—5400 E. Ninth St., Los Angeles, Calif.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, Calif.
2. Period (if for income tax, make separate form for each taxable year) from, 19...., to, 19....
3. Character of assessment or tax—Excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes)—\$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this Section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the

Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

Signed PACIFIC GOODRICH RUBBER
COMPANY

By S. M. JETT

Assistant Secretary

(Seal)

Sworn to and subscribed before me this 19 day of
August, 1935.

RUTH REES,

Notary Public

My Commission Expires Aug. 27, 1935.

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Elmer C. Boettcher & Son Co.

Character of assessment and period covered	List	Year	Month	Account No. on		Amount assessed	PAID, ABATED, OR CREDITED		Pd. Ab. Cr.
				Page	Line		Date	Amount	
Int. tax									
1924-25-155	disc.	1	2	10	2	\$ 1,200.00	4/1/25	\$ 1,200.00	Paid
Interest						569.75	7/1/25	569.75	Paid
A sum of excess interest of \$1.12 was allowed April 1, 1925. Ref: 1121									
The above assessment and its payment represent a completed credit.									
Total, \$						\$	Total, \$		

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state	
						Serial number	Period commencing
Previous Claim							
See Cl. No. 16,450.39							

REFUND

Nat Rogers 6th Cal.
Collector of Internal Revenue. (District)

COMMITTEE ON CLAIMS

Examine by
m
Approved by
Chief of Division

Amount claimed \$ 16,450.39
Amount allowed \$
Amount rejected \$ 16,450.39

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney, agent, or other fiduciary, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of officer having authority to sign for the corporation.

Mr. Blanche: After the stipulation was prepared, your Honor, there were some changes in the letters of the exhibits, and possibly we may not be exactly correct in them, but we will furnish the Court, in the brief to be filed, a correct designation of those exhibits.

We next offer in evidence, as Plaintiff's Exhibit E, amended claim for refund of Pacific Goodrich Rubber Company, in the amount of \$16,450.39, being the same amount as that demanded in the original claim for refund.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit E.")

PLAINTIFF'S EXHIBIT E

AMENDED CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Received Apr. 21, 1936. Coll. Int. Rev., Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps—Pacific Goodrich Rubber Company.

Business address—5400 E. Ninth Street, Los Angeles, California.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19....., to, 19.....

3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government
6. Amount to be refunded \$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes) \$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of Calif., a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires

upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agri-

cultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

Signed PACIFIC GOODRICH RUBBER
COMPANY

By S. M. JETT

(Seal)

Sworn to and subscribed before me this 30th day
of March, 1936.

ALBERTA M. TEWERS

Notary Public

(See Instructions on Reverse Side)

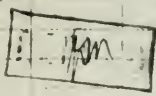
CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	ACCOUNT NO. OR		Amount assessed	PAID, ARRAYED, OR CREDITED		Pd. Adv. (C)
				Page	Line		Date	Amount	
Dec '33 addl at.	Misc	1934	Apr	1052	1	\$ 15,880	64 4/19/34	\$ 15,880.64	64
						569	75 7/30/34	569.75	75
Total, \$							Total, \$		

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state	
						Serial number	Period commencing
Previous Claim See Cl. No. R-2,753 R-31,017							



Collector of Internal Revenue.

(District)

COMMITTEE ON CLAIMS

Examined by—
Am
Approved by—
Chief of Division

Amount claimed \$ 16,450.39
Amount allowed... \$..
Amount rejected... \$ 1,450.39

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Committee of the exact basis thereof.
2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the finality of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature of the officer having authority to sign for the corporation.

38676

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit F, claim for refund dated August 19, 1935, filed on behalf of and by The B. F. Goodrich Company in the same amount as that specified in the Exhibits C and D, namely, \$16,450.39.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit F.")

PLAINTIFF'S EXHIBIT F

CLAIM

To be filed with the Collector where assessment
was made or tax paid

Received Aug. 31, 1935. Coll. Int. Rev. Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of tax illegally collected.

[] Refund of amount paid for stamps unused, or used in error or excess.

[] Abatement of tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19....., to, 19.....
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest
7. Amount to be abated (not applicable to income or estate taxes)—\$.....
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H.R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturer's sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the

Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

Assignment

Know all men by these presents that Pacific Goodrich Rubber Company, a corporation duly or-

ganized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does

hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and Secretary as of the 30th day of June, 1934.

PACIFIC GOODRICH RUBBER
COMPANY

By (s) J. D. TEW
President

Attest:

(s) S. M. JETT
Secretary

GTK

(Signed) THE B. F. GOODRICH COMPANY
By S. M. JETT
Secretary

(Seal)

Sworn to and subscribed before me this 19 day
of August, 1935.

(Seal) RUTH REES

My Commission expires Aug. 27, 1935

(See Instructions on Reverse Side)

certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

certify that the records of this office show the following facts as to the purchase of stamps:

Collector of Internal Revenue.

(District)

COMMITTEE ON CLAIMS

examined by—		COMMITTEE ON CLAIMS
Amount claimed \$		
approved by		
Amount allowed... \$		
Act of Discretion		
Amount rejected... \$		

The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Com-
moner of the exact basis thereof.

The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy or internal revenue agent.

1. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legality of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the fiduciary is still acting.

Where the taxpayer is an individual, the declaration shall be signed with the corporate name, followed by the signature and title of an officer having authority to bind the corporation.

7-2

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit G, amended claim of refund—I may say, if your Honor please, that these claims were specifically pleaded in two particulars as far as The B. F. Goodrich Company is concerned in the petition, and denied for lack of information wholly. This bears date of April 17, 1938.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit G.")

PLAINTIFF'S EXHIBIT G

AMENDED CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [] Refund of tax illegally collected.
- [] Refund of amount paid for stamps unused, or used in error or excess.
- [] Abatement or tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, Calif.

Residence

The deponent, being duly sworn according to law,

deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19....., to, 19.....
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest
7. Amount to be abated (not applicable to income or estate taxes)—\$.....
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section

602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires, upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that

“processing taxes” as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. -

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

.....
Collector of Internal Revenue

.....
(District)

Committee on Claims

Amount claimed\$.....

Amount allowed\$.....

Amount rejected\$.....

Instructions

1. The claim must be set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Mr. Blanche: We next offer, as Plaintiff's Exhibit H, three letters. It is suggested that these be offered as one exhibit and marked H-1, H-2 and H-3.

The Court: So ordered.

The first thereof being addressed to The B. F. Goodrich Company and signed by Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner; H-2 being addressed to the [9] same named

corporation and signed by the same named persons; H-3 is a letter addressed to Pacific Goodrich Rubber Company, and signed by the same named persons as those heretofore noted.

(The documents referred to *was* received in evidence and marked "Plaintiff's Exhibits H-1, H-2 and H-3.")

PLAINTIFF'S EXHIBIT H-1

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cl. S-38677

[Date illegible]

The B. F. Goodrich Company,
5400 E. Ninth Street,
Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$16,450.39, representing tax and interest paid by the Pacific Goodrich Rubber Company, 5400 E. 9th Street, Los Angeles, California, under the provisions of section 602 of the Revenue Act of 1932.

It is stated that you are entitled to the refund of the above tax since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Rubber Company erroneously paid manufacturers' excise tax in the amount claimed for the reason that floor tax was paid on the cotton content of the tires in question.

There is on file in this office a claim filed by the Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: D. S. BLISS,

Deputy Commissioner.

cc-Los Angeles, California.

PLAINTIFF'S EXHIBIT H-2

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cl. S-38676

90
[5]

May 22, 1936

Pacific Goodrich Rubber Company,

5400 E. Ninth Street,

Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$16,450.39, representing tax paid under the provisions of section 602 of the Revenue Act of 1932, for the months of November and December 1933.

The claim is based on the contention that a proper interpretation of section 9(a) of the Agricultural Adjustment Act entitles you to the credit for floor tax paid on the cotton contents of tires in computing manufacturer's excise tax due thereon. You insist that the words "processing tax" as used in this section of the Act means any and all taxes levied under the Agricultural Adjustment Act.

Under date of April 8, 1936 this office rejected your claim No. S-31017 for refund of the amount

of tax involved in this claim and based on the same contentions.

Since you have failed to furnish any new and material evidence in support of the claim, the previous action of this office is sustained and the present claim rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: D. S. BLISS,

Deputy Commissioner.

cc-Los Angeles, California.

PLAINTIFF'S EXHIBIT H-3
TREASURY DEPARTMENT
Washington
Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
and Refer to
MT:ST:DM
Cls: S-38676 and 38677

June 23, 1936

The B. F. Goodrich Company,
Akron, Ohio.

Attention: Mr. F. C. Leslie.

Gentlemen:

Reference is made to your letter of June 8, 1936,

requesting to be advised as to whether the claims filed by Pacific Goodrich Rubber Company, Los Angeles, California, and the B. F. Goodrich Company, Los Angeles, California, both in the amount of \$16,450.39, which were rejected in office letters dated May 22, 1936, were the claims filed with the Collector of Internal Revenue, Los Angeles, California, under date of April 17, 1936.

You are advised that the receiving stamps on the above claims indicate that they were received in the office of the Collector of Internal Revenue, Los Angeles, California, on April 21, 1936.

Respectfully,

D. S. BLISS,

Deputy Commissioner.

Mr. Blanche: We offer as Plaintiff's next exhibit, I, copy of the minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, held on July 6, 1934;

We also offer as No. 1 of the last named exhibit, minutes of a special meeting of the stockholders of Pacific Goodrich Rubber Company, likewise held on Friday, July 6, 1934.

(The documents referred to *was* received in evidence and marked "Plaintiff's Exhibits I, and I-1.")

PLAINTIFF'S EXHIBIT I

The undersigned, S. M. Jett, Secretary of Pacific Goodrich Rubber Company, a Delaware Corporation, hereby certifies that the minutes attached hereto are true and correct copies of minutes of the meeting of the stockholders of that company held on July 6, 1934, and of the meetings of the Board of Directors held on July 6 and August 24, 1934, all as appears by the records of the company in his official custody.

In witness whereof, the undersigned has set his hand and affixed the seal of the corporation, this 19th day of January, 1940.

S. M. JETT

Secretary

Pacific Goodrich Rubber Company

SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF PACIFIC GOODRICH
RUBBER COMPANY

Minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, Friday July 6, 1934.

There were present Messrs. J. D. Tew, S. B. Robertson, T. B. Tomkinson, S. M. Jett, representing a majority of the Board of Directors and thereby constituting a quorum for the transaction of business.

Mr. Tew, President, presided as Chairman of the meeting and Mr. Jett, Secretary, kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a waiver of notice and consent signed by all of the directors of the corporation.

The Chairman then announced that the meeting had been called for the purpose of formally voting on a proposal to dissolve the corporation, and upon favorable action taken thereon at this meeting, to recommend to the stockholders the dissolution of the corporation. He stated that, as known to all of the directors present, the possession of all property and assets of the corporation had been delivered over to The B. F. Goodrich Company as the owner of all of the stock of the corporation at the close of business on June 30, 1934, but that this meeting had been called to ratify such action on the part of the management according to law.

Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved. that in the judgment of this Board of Directors it is advisable and most for the benefit of Pacific Goodrich Rubber Company that said corporation should be dissolved, and to that end and as required by law, that a meeting of the stockholders of said corporation be held at 500 South Main Street, Akron, Ohio, on the 6th day of July, 1934, at 2 o'clock in the

afternoon to take action upon this resolution, and

Be it further resolved, that this Board of Directors does hereby ratify the action taken by the management of this corporation in transferring to and delivering over possession to The B. F. Goodrich Company of all of the assets of this corporation at the close of business on June 30, 1934, as a distribution in kind to the stockholders of all the assets of this corporation, and hereby recommends the ratification and approval by the stockholders of such action on the part of the management of the corporation, and

Be it further resolved, that the Secretary of this corporation be and he hereby is directed to cause notice of the adoption of this resolution to be given to each stockholder of the corporation.

There being no further business, the meeting was on vote adjourned.

PLAINTIFF'S EXHIBIT I-1

SPECIAL MEETING OF THE STOCKHOLDERS OF PACIFIC GOODRICH RUBBER COMPANY.

Minutes of a special meeting of the stockholders of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, on Friday, July 6, 1934, at 2 o'clock in the afternoon. There were present either in person or by proxy all of the stockholders of the corporation.

Mr. Tew, President, presided as Chairman of the meeting and Mr. Jett, Secretary, kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a Waiver of Notice and Consent signed by all of the stockholders.

The Chairman then announced that the meeting had been called for the purposes set forth in the aforesaid Waiver of Notice and Consent. Thereupon, on motion duly made and seconded, the following resolution was unanimously adopted:

Whereas, it is in the judgment of the stockholders of this corporation advisable and most for the benefit of the corporation that the corporation be dissolved, as recommended by resolution of its Board of Directors at a meeting duly called and held,

Now, therefore, be it resolved that the proper officers of the corporation are hereby authorized and directed to obtain the execution by all of the stockholders of the corporation of a cer-

tificate of dissolution by unanimous consent, and to file said certificate with the Secretary of State of the State of Delaware.

The Chairman then announced that the corporation, acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the company. Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved that the stockholders of this corporation do hereby unanimously ratify and approve the action of the management of the corporation in transferring and delivering over to The B. F. Goodrich Company at the close of business on June 30, 1934, possession and control of all of the property and assets of the corporation as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by said The B. F. Goodrich Company, and

Be it further resolved that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are authorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further

acts and assignments of bills and accounts receivable or other instruments as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the assets of this corporation.

The Secretary then called to the attention of the meeting the fact that the company should be withdrawn from the State of California, so as to prevent the incurring of further liability for taxes in that state. Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved that the proper officers of the corporation are hereby authorized and directed to execute and file with the proper official or officials of the State of California a certificate of withdrawal or such other instruments as may be necessary to effectuate the withdrawal of this corporation from the State of California.

There being no further business, the meeting on vote adjourned.

SPECIAL MEETING OF THE BOARD OF DIRECTORS OF PACIFIC GOODRICH RUBBER COMPANY

Minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, Friday, August 24, 1934.

There were present Messrs. J. D. Tew, S. B. Robertson, T. B. Tomkinson, and S. M. Jett, representing a majority of the Board of Directors and therefore constituting a quorum for the transacting of business.

Mr. Tew, President, presided as Chairman of the meeting, and Mr. Jett, Secretary kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a waiver of notice and consent signed by all the directors of the corporation.

The Chairman then announced that the meeting had been called for the purpose of formally ratifying the execution and delivery of a certain assignment by the corporation, dated June 30, 1934, to The B. F. Goodrich Company and for the further purpose of authorizing the execution of deeds of conveyance and such other instruments as may be necessary to vest in The B. F. Goodrich Company full and complete title to all real property owned by the corporation.

Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved, that the Directors of this corporation do hereby unanimously ratify and approve the execution and delivery by the President and Secretary of the corporation of a certain assignment, dated June 30, 1934, transferring and setting over unto The B. F. Goodrich Company all rights, claims, and choses in action of every nature and description which the corporation now has or shall have against any and

all persons, firms or corporation, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment, and

Be it further resolved, that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are authorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further acts as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the real estate of this corporation.

There being no further business, the meeting on vote adjourned.

Mr. Blanche: We offer as Plaintiff's next exhibit, J, certificate of the Secretary of State of Delaware certifying the dissolution, under date of December 21, 1934, of Pacific Goodrich Rubber Company.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit J.")

PLAINTIFF'S EXHIBIT J

State of Delaware
Office of Secretary of State

CERTIFICATE OF DISSOLUTION

To All Whom These Presents May Come, Greeting:

Whereas, It appears to my satisfaction by duly authenticated record of the proceedings for the voluntary dissolution thereof, by the consent of all the stockholders deposited in my office, the Pacific Goodrich Rubber Company a corporation of this State whose principal office is situated at No. 100 West 10th Street in the city of Wilmington, County of New Castle State of Delaware The Corporation Trust Company being agent therein, and in charge thereof, upon whom process may be served, has complied with the requirements of the Corporation Laws of the State of Delaware, as contained in 1915. Section 1, to 2101 Section 187, Chapter 65, of the Revised Statutes of 1915, as amended, preliminary to the issuing of this Certificate of Dissolution.

Now, therefore, I Walter Dent Smith Secretary of State of the State of Delaware, do hereby certify that the said corporation did on the twenty-first day of December A. D. 1934 file in the office a duly executed and attested consent, in writing, to the dissolution of said corporation executed by all the stockholders thereof, which said consent and the records of the proceedings aforesaid, are now on file in my said office as provided by law.

In testimony whereof, I have hereunto set my hand and official seal, at Dover this twenty-first

day of December in the year of our Lord one thousand nine hundred and thirty-four.

(Seal)

WALTER DENT SMITH

Secretary of State

State of Delaware,

New Castle County—ss.

Recorded in the Recorder's Office at Wilmington, in Corporation Record W Vol. 42 Page 101 &c., the 23rd day of January A. D., 1935.

Witness my hand and official seal.

ALBERT STETSER

Recorder,

By EUGENE N. SCARBOROUGH

Deputy Recorder.

Mr. Blanche: If the Court please, that concludes the exhibits to be introduced by Plaintiff with the exception of Exhibit A, which is to be supplied [10] when the messenger arrives with the photostated copy.

The Court: With that, the Court understands that the Plaintiff rests now——

Mr. Blanche: Yes, your Honor.

Mr. Jewell: On behalf of the Government, I would like to offer into evidence a copy of the manufacturers' excise tax return for the month of November, filed by the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 1.

(The document referred to was received in evidence and marked "Government's Exhibit No. 1.")

Form 726—Rev. Sept., 1932
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

MANUFACTURER'S EXCISE TAXES

1527
GOVERNMENT'S EXHIBIT

Sections 4481 and 4482, Act of Oct. 3, 1917, as amended
Section 4481, Act of Oct. 3, 1917, as amended

CHARACTER OF TAX

CHARACTER OF TAX	RATE	AMOUNT OF TAX
(1) Tires	2½ cts. per lb.	15 740 78
(2) Inner tubes	10 cts. per lb.	8 337 08
(3) Toilet preparations (perfumes, cosmetics, etc.)	10%	
(4) Toilet preparations (tooth paste, toilet soap, etc.)	10%	
(5) Articles made of fur	10%	
(6) Jewelry	10%	
(7) Auto truck chassis and bodies	3%	
(8) Other auto chassis and bodies and motor cycles	3%	
(9) Parts and accessories	3%	
(10) Radio receiving sets	10%	
(11) Mechanical refrigerators	5%	
(12) Sporting goods	10%	
(13) Firearms, shells, and cartridges	10%	
(14) Cameras and lenses	10%	
(15) Candy	10%	
(16) Sporting guns	10%	
(17) Pistols and revolvers	10%	

AMOUNT OF TAX	AMOUNT OF TAX
Total tax due	\$ 21 077 81
Less overpayment for month of _____, 1933	
DEPOSIT FOR MONTH OF _____, 1933	\$ 21 077 81
Penalty, 25 per cent.	
Interest	
LO Total amount due, O.A.L.	\$ 21 077 81

I swear (or affirm) NOV foregoing 1933 the return of the amount of tax due for the month of _____, 1933, and that the amount deducted for overpayment is correct and allowable by law.

Signed PACIFIC GOODRICH RUBBER COMPANY

(State whether individual owner of business, member of firm, or if officer of corporation or duly authorized manager or agent, give title)

Sworn and subscribed before me this 26 day of Nov, 1933

(Notary or Witness) (See paragraph 2 of instructions) (Title or (Witness))

IMPORTANT—Return with remittance should be sent to the Collector of Internal Revenue for your district and NOT to the Commissioner of Internal Revenue at Washington, D. C. (See instructions, par. 2, on reverse of DUPLICATE form.) If you have nothing to report, make notation to that effect on this form and return to the Collector of Internal Revenue. If final return is filed, the return should be marked "FINAL RETURN".

My Commission Expires Oct. 31, 1934

Name PACIFIC GOODRICH RUBBER CO
No. and Street 5400 E 9TH ST
City and State LOS ANGELES CALIF 10835

ORIGINAL RETURN.—This form must be returned to the Collector of Internal Revenue.

INSTRUCTIONS

(For full instructions see Regulations 46, June, 1932, and Regulations 47, revised Oct., 1928)

1. LA W.—The Revenue Act of 1932 imposes taxes upon the following articles sold by the manufacturer, producer, or importer:

Section	Article	Rate
602	(a) Tire wholly or in part of rubber (exclusive of metal rims and rim bases)—on total weight.	2½ cts. per lb.
603	(b) Inner tubes (for tires) wholly or in part of rubber—on total weight.	10 cts. per lb.
604	(c) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished.	10% of sale price.
605	(d) Tooth and mouth washes, dentifrices, tooth pastes, and toilet soaps.	5% of sale price.
606	(e) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value.	10% of sale price.
607	(f) All articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornaments, mounted, or fitted, with precious metals or imitations thereof or ivory (not including surgical instruments or silver-plated ware, or frames or mountings for spectacle or eyeglasses); watches; clocks; parts for watches or clocks sold for more than 9 cents each; opera glasses; longpipes; marine glasses; field glasses; and binoculars.	10% of sale price.
608	(g) No tax is imposed on any article used for religious purposes or on any article (other than watch parts or clock parts) sold for less than \$3.00.	
609	(h) Auto truck chassis and auto truck bodies (including in both cases parts or accessories therefor sold on or in connection therewith or with the sale thereof).	3% of sale price.
610	(i) Other auto chassis and bodies and motor cycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors.	3% of sale price.
611	(j) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b).	3% of sale price.
612	(k) Chassis, cabinets, tubes, reproducing units, power packs, and phonograph mechanisms, suitable for use in connection with or as part of radio receiving sets or combination radio and phonograph sets (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), and records for phonographs.	2% of sale price.
613	(l) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor, sold on or in connection therewith or with the sale thereof).	5% of sale price.
614	(m) Cabinets, compressors, condensers, expansion units, absorbers, and controls for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) (including in each case parts or accessories for such refrigerator components sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete refrigeration or refrigerating or cooling apparatus.	5% of sale price.
615	(n) Sporting goods, games, etc.	5% of sale price.
616	(o) Firearms, shells, and cartridges. The tax does not apply (a) to articles sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia or (b) to pistols and revolvers.	10% of sale price.

2-15027

Mr. Jewell: I also offer into evidence on behalf of the Government, copy of the return of the manufacturers' excise taxes for the month of December 1933, filed by the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 2.

(The document referred to was received in evidence and marked "Government's Exhibit No. 2.")

Form 750—Revised Aug. 1933
TREASURY DEPARTMENT
INTERNAL REVENUE

GOVERNMENT'S EXHIBIT 2

MANUFACTURER'S EXCISE TAXES

(Sections 615-616 Incl. Act of 1932;
Section 605, Rev. Act of 1926.)

CHARACTER OF TAX	RATE	AMOUNT OF TAX	RECEIVED	AMOUNT OF TAX
(1) Tires	2 1/2 cts. per lb.	18 721 37	RECEIVED Total Including EXEMPTION 23,524 48 NOV 1934 Penalty, 25 percent INTEREST 1934 JAN 1	23 524 48
(2) Tires wholly or in part of rubber (exclusive of metal rims and rim bases)—on total weight	2 1/2 cts. per lb.	4 803 37		23 524 48
(3) Inner tubes (for tires) wholly or in part of rubber—on total weight	4 cts. per lb.			23 524 48
(4) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic	10% of sale price.			23 524 48
(5) Tooth and mouth washes, dentifrices, tooth pastes, and toilet soaps	5% of sale price.			23 524 48
(6) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value	10% of sale price.			23 524 48
(7) All articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted, with precious metals or imitations thereof or ivory (not including surgical instruments of silver-plated ware, or frames or mountings for spectacles or eyeglasses); watches; clocks; parts for watches or clocks sold for more than 9 cents each; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars	10% of sale price.			23 524 48
(8) No tax is imposed on any article used for religious purposes or on any article (other than watch parts or clock parts) sold for less than \$3.00				23 524 48
(9) Auto truck chassis and auto truck bodies (including in both cases parts or accessories therefor sold on or in connection therewith or with the sale thereof)	2% of sale price.			23 524 48
(10) Other auto chassis and bodies and motor cycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors	2% of sale price.			23 524 48
(11) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b)	2% of sale price.		23 524 48	
(12) Chassis, cabinets, tubes, reproducing units, power packs, and phonograph mechanisms, suitable for use in connection with or as part of radio receiving sets or combination radio and phonograph sets (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), and records for phonographs	5% of sale price.		23 524 48	
(13) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor, sold on or in connection therewith or with the sale thereof)	5% of sale price.		23 524 48	
(14) Cabinets, compressors, condensers, expansion units, absorbers, and controls for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) (including in each case parts or accessories for such refrigerator components sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus	5% of sale price.		23 524 48	
(15) Sporting goods, games, etc.	10% of sale price.		23 524 48	
(16) Firearms, shells, and cartridges. The tax does not apply (a) to articles sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia or (b) to pistols and revolvers	10% of sale price.		23 524 48	

I swear (or affirm) that the foregoing is a true return of the amount of tax due for the month of **DEC** 1933 and that the amount of the credit deducted is correct and allowable by law.

Signed **PACIFIC GOODRICH RUBBER COMPANY**

(State whether individual owner of business, member of firm, or if owner of corporation or fully authorized manager or agent, give title)

Subscribed and sworn to before me this **29th** day of **Jan**, 1934

NOTARY PUBLIC

(Name and address of Notary Public)

IMPORTANT—Return with remittance should be sent to the Collector of Internal Revenue for your district and NOT to the Commissioner of Internal Revenue at Washington, D. C. (See instructions, par. 2, on reverse of DUPLICATE form.) If you have nothing to report, make notation to that effect on this form and return to the Collector of Internal Revenue. If final return is filed, the return should be marked "FINAL RETURN."

3-18927

ORIGINAL RETURN.—This form must be returned to the Collector of Internal Revenue.

INSTRUCTIONS

(For full instructions see Regulations 46, June, 1932, and Regulations 47, revised Oct., 1933)

1. LAW.—The Revenue Act of 1933 imposes taxes upon the following articles sold by the manufacturer, producer, or importer:

Section	Article	Rate
602 (a)	Tires wholly or in part of rubber (exclusive of metal rims and rim bases)—on total weight	2 1/2 cts. per lb.
	Inner tubes (for tires) wholly or in part of rubber—on total weight	4 cts. per lb.
603	Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic	10% of sale price.
	cachous, toilet powders, and any similar substance, article, or preparation, by whatever name known or designated.	5% of sale price.
604	Tooth and mouth washes, dentifrices, tooth pastes, and toilet soaps	10% of sale price.
605	Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value	10% of sale price.
606	All articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted, with precious metals or imitations thereof or ivory (not including surgical instruments of silver-plated ware, or frames or mountings for spectacles or eyeglasses); watches; clocks; parts for watches or clocks sold for more than 9 cents each; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars	10% of sale price.
607	No tax is imposed on any article used for religious purposes or on any article (other than watch parts or clock parts) sold for less than \$3.00	
608 (a)	Auto truck chassis and auto truck bodies (including in both cases parts or accessories therefor sold on or in connection therewith or with the sale thereof)	2% of sale price.
	Other auto chassis and bodies and motor cycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors	2% of sale price.
609	Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b)	2% of sale price.
610	Chassis, cabinets, tubes, reproducing units, power packs, and phonograph mechanisms, suitable for use in connection with or as part of radio receiving sets or combination radio and phonograph sets (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), and records for phonographs	5% of sale price.
611	Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor, sold on or in connection therewith or with the sale thereof)	5% of sale price.
612	Cabinets, compressors, condensers, expansion units, absorbers, and controls for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) (including in each case parts or accessories for such refrigerator components sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus	5% of sale price.
613	Sporting goods, games, etc.	10% of sale price.
614	Firearms, shells, and cartridges. The tax does not apply (a) to articles sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia or (b) to pistols and revolvers	10% of sale price.

3-18927

B-4

Mr. Jewell: I also offer into evidence a copy of the claim for abatement for the period from June 21, 1932 through June 30, 1934, filed on July 8, 1936, by The B. F. Goodrich Company, successor to the Pacific Goodrich Company, at Akron, Ohio.

The Clerk: Government's Exhibit 3.

(The document referred to was received in evidence and marked "Government's Exhibit No. 3.") [11]

GOVERNMENT'S EXHIBIT 3

CLAIM

To be filed with the Collector where assessment
was made or tax paid

Received Jul. 8, 1936. Collector of Internal Revenue, 18th Dist. of Ohio, Claims Division.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[] Refund of tax illegally collected.

[] Refund of amount paid for stamps unused, or used in error or excess.

[x] Abatement of tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company, successor to Pacific
Goodrich Rubber Company.

Business address—500 South Main Street, Akron,
Ohio.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California District.
2. Period (if for income tax, make separate form for each taxable year) from June 21, 1932 thru June 30, 1934.
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$33,876.26 plus interest in sum of \$7,701.48.
5. Date stamps were purchased from the Government—Excise tax incurred during various months for period above named.
6. Amount to be refunded—\$.....
7. Amount to be abated (not applicable to income or estate taxes)—full amt. of assessment, namely \$33,876.26 plus interest in sum of \$7,701.48.
8. The time within which this claim may be legally filed expires, under Section.....of the Revenue Act of 19....., on, 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

See Exhibit "A", consisting of four typewritten

pages, attached hereto and made a part of this claim.

(Signed) THE B. F. GOODRICH COMPANY,
Successor to The Pacific Goodrich
Rubber Company

By [Name illegible]

(Seal) Treas.

Sworn to and subscribed before me this 7th day
of July, 1936.

ALBERTA M. TEWERS

Notary Public

My Commission expires December 15, 1938.

(See Instructions on Reverse Side)

Exhibit "A"

Reference is made to the report of Internal Revenue Agents, A. M. Menninger, George L. Carr, and Fred L. MacCarroll, dated March 4, 1936, in which it is recommended that an assessment of additional excise tax in the sum of \$33,876.26, plus appropriate interest, be made against the Pacific Goodrich Rubber Company.

Pacific Goodrich Rubber Company transferred its assets to The B. F. Goodrich Company on or about June 30, 1934, and was dissolved December 21, 1934. Hence, the proper taxpayer is The B. F. Goodrich Company.

The taxpayer insists that the recommendation of the Revenue Agents is erroneous and hereby protests any assessment of additional excise taxes for

the period involved, based upon said recommendation, for reasons hereinafter set forth.

Schedule #1. "Borrowed Tires"—\$11,057.97

The Revenue Agents' report proposes an assessment under the above schedule against tires which Pacific Goodrich Rubber Company delivered to The B. F. Goodrich Rubber Company after June 21, 1932, for which no tax was paid in the Pacific Goodrich Rubber Company returns. The tires in question were tires delivered in repayment of the loan of inventory from time to time made by The B. F. Goodrich Rubber Company to the Pacific Goodrich Rubber Company in order to permit the latter company to meet delivery requirements of its automobile manufacturers, export and government customers. Such deliveries were made on the same basis as the types and sizes originally borrowed.

There was in existence prior to the effective date of the excise tax levied by Section 602 of the Revenue Act of 1932, a contract between The B. F. Goodrich Rubber Company and Pacific Goodrich Rubber Company under which the latter company took the entire production of Pacific Goodrich Rubber Company as manufactured, said contract reserving the right in Pacific Goodrich Rubber Company to supply certain customers, among which were the class of customers above set out, the reason for reserving this right being due to competitive conditions which necessitated the sale of tires by a manufacturer direct to these customers. For the period from November, 1932 through June 1933,

the manufacturer's stock of tires was so out of balance that it was necessary for it to secure tires from The B. F. Goodrich Rubber Company for delivery to its customers. The inventory in the hands of The B. F. Goodrich Rubber Company which had been delivered by Pacific Goodrich Rubber Company subsequent to the effective date of Section 602 of the Revenue Act of 1932 was tax paid tires. If the Pacific Goodrich Rubber Company had paid a tax on tires which it delivered to The B. F. Goodrich Rubber Company in repayment of loans, such tires would have been subjected to a double tax.

The B. F. Goodrich Company, the parent company of both Pacific Goodrich Rubber Company and The B. F. Goodrich Rubber Company, had a contract with The B. F. Goodrich Rubber Company similar to that between Pacific Goodrich Rubber Company and The B. F. Goodrich Rubber Company. It also found itself in a similar condition to that of Pacific Goodrich Rubber Company with reference to its inability to make deliveries to its customers because of an unbalanced stock of merchandise, early in the tax period involved in this case. The B. F. Goodrich Company presented its problem to the Deputy Commissioner of Internal Revenue and received a ruling from that officer that it could borrow tires under the circumstances above outlined, from its selling organization and return the same without incurring an excise tax at the time such tires were returned. After such ruling

had been secured from the Deputy Commissioner's office, Revenue Agents Dodson and MacCarroll made an examination of the books and records of The B. F. Goodrich Company for the purpose of determining its tax liability for the period from June 21, 1932 to December 31, 1932. The report of the above named Revenue Agents recommended an assessment of additional tax upon tires delivered to The B. F. Goodrich Rubber Company under the above outlined circumstances. This proposal was again considered by the Deputy Commissioner of Internal Revenue and the recommendation of Revenue Agents Dodson and MacCarroll was not approved and no additional tax was assessed, the Deputy Commissioner holding that such transaction was not a taxable transaction. Subsequent to this ruling, and on or about May 20, 1933, the Secretary of the Treasury executed with The B. F. Goodrich Company an agreement on Treasury Department Form 866. As soon as The B. F. Goodrich Company received the Commissioner's first ruling that the delivery of tires to The B. F. Goodrich Rubber Company by the manufacturer, under the circumstances above outlined, did not constitute a taxable transaction, it advised its subsidiary, the Pacific Goodrich Rubber Company, of such ruling.

Consequently, the transaction upon which the Revenue Agents are proposing an assessment of additional tax under Schedule #1 is a transaction which the Deputy Commissioner's office has heretofore held to be a non-taxable transaction.

The Pacific Goodrich Rubber Company did not "attempt in any manner to evade or defeat any tax or the payment thereof under Articles IV, V, VI, VII, VIII and/or IX." On the other hand, the taxpayer, through its parent company, advised the Deputy Commissioner of Internal Revenue just how these transactions were being treated and secured that officer's approval of so handling such transaction.

The position of the Internal Revenue Agents that the transaction above described was an attempt to rescind a completed sale is erroneous. There was never any cancellation of charges for tires sold by the Pacific Goodrich Rubber Company to The B. F. Goodrich Rubber Company and no merchandise was returned, so far as the transactions above described are concerned, both of which would be necessary in order to rescind a sale.

The taxpayer insists that the transactions above described are not taxable under the law and the interpretation of said law relied upon by the taxpayer, and that no part of the tax proposed in Schedule #1 should be assessed.

Schedule #2. "Sales to Chevrolet Motor Company"
—\$1,060.29

Statements made in connection with proposed tax under Schedule #1 apply generally to the tax proposed under Schedule #2 and the taxpayer's position with reference to the tax suggested under this schedule is the same as under Schedule #1.

The only appreciable difference in the facts governing the transaction involved in this schedule is that some of the tires borrowed by Pacific Goodrich Rubber Company were of the manufacture of The B. F. Goodrich Company.

Schedule #3. "Credits taken for Borrowed Tires"
—\$3,443.30.

The facts in connection with the transaction involved under this schedule are the same as under Schedule #1 except that Pacific Goodrich Rubber Company did not repay The B. F. Goodrich Rubber Company for tires borrowed from it by type and size, due to the fact that both The B. F. Goodrich Rubber Company and Pacific Goodrich Rubber Company transferred their assets and were dissolved during 1934, and the only way by which Pacific Goodrich Rubber Company could liquidate its obligation to The B. F. Goodrich Rubber Company was through the delivery of tires of the same value as those previously borrowed, without regard to size and type.

The taxpayer insists that the handling of an isolated transaction in this manner could in no event affect the principle. Neither does it justify the assessment of the tax recommended by the Agents under this schedule.

Schedule #4. "Credit taken on sales made by The B. F. Goodrich Rubber Company to International Goodrich Rubber Company for export"
—\$11,305.72.

Pacific Goodrich Rubber Company complied with the provisions of Treasury Department Decision 4355 in connection with credits taken by it on merchandise sold into export through its subsidiary selling company. The documents supporting the handling of transactions in accordance with Treasury Decision 4355 are on file in the offices of The B. F. Goodrich Company at Akron, Ohio. The Revenue Agents making the examination were advised of this fact prior to the time the examination was made and during the examination. Documents supporting the credits taken under this schedule are, of course, quite numerous and the sending of these documents from Akron to Los Angeles would involve a considerable amount of trouble and expense as well as endanger the safety of such records. For this reason, the records were not sent to Los Angeles. The B. F. Goodrich Company hereby tenders these records to the Deputy Commissioner or any of his agents in its office in Akron, Ohio, or if the Commissioner insists, copies of such documents will be filed with the Deputy Commissioner's office.

The Revenue Agents' statement that credits involved under this schedule were not taken in accordance with these regulations is incorrect.

Schedule #5. "Credits taken on Tire Adjusted"—
\$6,908.98

The Pacific Goodrich Rubber Company took credits on tires adjusted under its guaranty on the

same basis as did The B. F. Goodrich Company, namely, credit was taken for all adjustments made under the manufacturer's guaranty, either expressed or implied, through the various agents and dealers of the manufacturer. In some cases, the defective tires were returned to the manufacturer; in others, they were not. In all instances, where a new tire was given to a customer through a dealer or agent of Pacific Goodrich Rubber Company, the tire which the agent or dealer gave to the customer was one which was furnished to it by the Pacific Goodrich Rubber Company, whether such tire was furnished for that specific purpose and directly following the adjustment or at some future time when shipment or delivery of that tire could be more conveniently and less expensively made to the dealer, and the cost of all adjustments was borne by Pacific Goodrich Rubber Company, the manufacturer liable to the customer for a defective tire.

The Revenue Agents' suggestion that The B. F. Goodrich Rubber Company, Goodrich Silvertown Stores, Inc. (Goodrich Silvertown Inc.), Pacific Goodrich Rubber Company, and other subsidiaries of The B. F. Goodrich Company should all be considered as one unit for tax purposes in order to allow this credit cannot be insisted upon by the taxpayer for such are not the facts. All of these corporations were separate entities doing business with each other at arm's length, upon a definite contract basis. A further fallacy in this suggestion is that in order to accomplish the purpose suggested

by the Revenue Agents, dealers would likewise have to be considered as a part of the Goodrich unit since a number of adjustments were made by dealers and since Pacific Goodrich Rubber Company's relations, so far as its sales and adjustments were concerned, were the same with the companies above named as with any other dealers.

"Brunswick Tires"

Payment of excise tax due on the sale of 835 Brunswick tires to the Cleveland office instead of the Los Angeles office, was the result of an error and if it is necessary to make any correction with reference to the District to which this tax was paid, it is suggested that an easier way to make this correction would be through an adjustment by the Government, particularly since the corporation who would have to pay any additional tax to Los Angeles is the same corporation who would file a claim for refund for the erroneous payment in Cleveland.

The facts set forth herein are supported by books, records and documents at the office of The B. F. Goodrich Company, Akron, Ohio.

The principle involved in connection with the tax recommended for assessment under Schedules 1, 2 and 5 have already been passed upon by the Deputy Commissioner and approved both through his act of declining to assess additional tax on recommendations made by the Internal Revenue Agents and by the closing agreement on Form 866. While the transaction upon which the Revenue Agents base

their recommendations for the assessment of the tax under Schedule #3 is not exactly the same as those involved as to Schedule #1, the taxpayer insists the principle is the same and that the principle has been passed upon by the Deputy Commissioner favorably to the taxpayer.

The Revenue Agents' recommendation with reference to an assessment of tax proposed under Schedule #4 is apparently based upon the lack of evidence required by Treasury Decision 4355 in connection with export credits. This information is available and can be checked in any manner in which the Government cares to have it checked.

In view of the foregoing, the taxpayer respectfully requests that the recommendation set forth in the Revenue Agents' report above referred to be disregarded and that no additional tax be assessed against The B. F. Goodrich Company as successor to Pacific Goodrich Rubber Company on the basis outlined in said report.

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

by that the records of this office show the following facts as to the purchase of stamps:

ABATEMENT

ST-RJ 6170

SEP 30 1937

Collector of Internal Revenue

1811. 2318

(District)

COMMITTEE ON CLAIMS

Claim examined by— *[Signature]* *41,577.74*
 Amount claimed... ~~*23,576.22*~~
 Claim approved by— *[Signature]*
 Amount allowed... \$
 Chief of Division. Amount rejected... \$ *41,577.74*

COMMITTEE ON CLAIMS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifying and authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

E-2

Mar. 1933	Misc. 1933	May	1005	8	144,410	70	5/1/33	144,410	70	Pd.
Apr. 1933	Misc. 1933	June	1008	4	303,166	12	6/1/33	303,166	12	Pd.
May 1933	Misc. 1933	July	1017	2	440,183	92	7/6/33	440,183	92	Pd.
June 1933	Misc. 1933	Aug.	1005	3	539,669	15	8/1/33	539,669	15	Pd.
July 1933	Misc. 1933	Sept	1002	1	451,628	75	9/1/33	451,628	75	Pd.
Aug. 1933	Misc. 1933	Oct.	1013	1	364,751	00	10/2/33	364,751	00	Pd.
Sept. 1933	Misc. 1933	Nov.	1007	2	249,852	39	11/1/33	249,852	39	Pd.
Oct. 1933	Misc. 1933	Dec.	1014	8	185,058	28	12/2/33	185,058	28	Pd.
Nov. 1933	Misc. 1934	Jan.	1014	5	152,368	63	1/3/34	152,368	63	Pd.
Dec. 1933	Misc. 1934	Feb.	1015	2	218,358	45	2/2/34	218,358	45	Pd.
Jan. 1934	Misc. 1934	Mar.	1017	5	201,954	92	3/3/34	201,954	92	Pd.
Feb. 1934	Misc. 1934	Apr.	1009	9	274,975	99	4/3/34	274,975	99	Pd.
Mar. 1934	Misc. 1934	May	1012	2	343,956	05	5/2/34	343,956	05	Pd.
Apr. 1934	Misc. 1934	June	1013	6	383,037	26	6/2/34	382,037	26	Pd.
May 1934	Misc. 1934	July	1017	4	419,790	92	7/5/34	419,790	92	Pd.
June 1934	Misc. 1934	Aug.	1008	0	186,139	33	8/2/34	186,139	33	Pd.

Add'l Tax Misc. 1934 Apr. 1019 7 33,896 61 4/10/34. 33,896 61 Pd.
 Not & Dec/33 11 1. 1. 2084 4 37 87

Special Assess. 6/21/32 to 12/31/32 - Misc. 1934 Apr. - 1023 8 534 33 4/12/33 534 33 Pd.

June to Dec. 1932

DEDUCTIBLE 50000.00 1000 24 24 1000	DEDUCTIBLE 50000.00 1000 24 24 1000	DEDUCTIBLE 50000.00 1000 24 24 1000	DEDUCTIBLE 50000.00 1000 24 24 1000
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5/21/34

8-3

Mr. Jewell: We offer into evidence a copy of claim for abatement, filed on May 19, 1936 by Nat Rogan, for the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 4.

(The document referred to was received in evidence and marked "Government's Exhibit No. 4.")

GOVERNMENT'S EXHIBIT 4

CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of tax illegally collected.
- ☐ Refund of amount paid for stamps unused, or used in error or excess.
- ☒ Abatement of tax assessed (not applicable to estate or income taxes).

State of Calif.,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps—Collector for Pacific Goodrich Rubber Co.

Business address—Los Angeles, Calif.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed.....
2. Period (if for income tax, make separate form for each taxable year) from, 19...., to....., 19....
3. Character of assessment or tax.....
4. Amount of assessment, \$.....; dates of payment
5. Date stamps were purchased from the Government
6. Amount to be refunded—\$.....
7. Amount to be abated (not applicable to income or estate taxes)—\$41,577.74.
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19...., on, 19....

The deponent verily believes that this claim should be allowed for the following reasons:

Abatement is asked of assessment on my March 1936 Misc. list, 2018/8, in accordance with Bureau instructions. See copy of telegram attached.

(Signed) NAT ROGAN

Collector

Sworn to and subscribed before me this 27 day of May, 1936.

DOROTHY F. HARRIS

Dep. Coll.

[Telegram]

Postal Telegraph

Collector Internal Revenue

LosA

May 18, 1936.

Re assessment page twenty eighteen line eight
your March nineteen thirty six miscellaneous assess-
ment list against Pacific Goodrich Rubber Co Los
Angeles Suggest you file Collectors abatement claim
since assessment should have been against B F
Goodrich Company Akron Ohio and amount rec-
ommended also appears excessive

BLISS

Deputy

NO PREVIOUS CLAIM

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	1st	Year	Month	Account No.		Amount assessed	Paid, Abated or Credited		Pd. in full
				Page	Line		Date	Amount	
Excise tax		Misc 1936	Mar.	2018	8	\$ 33,876.26			
Interest						\$ 7,701.48			
Total						\$ 41,577.74	Total		\$

DATE LISTED BY
COMMISSIONER *[Signature]*

Claim No.

I certify that the records of this office show the following facts as to the purchase of stamps: 3-20-11

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state	
						Serial number	Period commencing

35896

35896

[Signature] 6 Calif
Collector of Internal Revenue. (District)

Claim examined by--
[Signature]

Claim approved by--
[Signature]
Chief of Division

Amount claimed... \$41,577.74

Amount allowed... \$41,577.74

Amount rejected... \$.

COMMITTEE ON CLAIMS
[Signature]
DEPUTY COMMISSIONER
[Signature]

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

C-2

Mr. Jewell: With the Court's permission, I would like to confer with counsel.

The Court: Very well.

(Conference between counsel.)

Mr. Jewell: Reference is made to Paragraph (6)a of the stipulation on file herein. I believe it will be stipulated that that paragraph will be corrected to eliminate the statement there that the principal of the tax was assessed, and will be made to read so that the principal and interest were demanded, not assessed, of the Pacific Goodrich Company on the date—I believe April 10, 1934—and that the principal of that additional tax was never assessed but that the interest was assessed on June 9, 1934.

Mr. Leslie: Mr. Jewell, would you modify your stipulation by saying, “not formally assessed”—Otherwise I have no objection.

Mr. Jewell: That it was not formally assessed.

The Court: That is the principal——

Mr. Jewell: That is the principal; thereby meaning that the amount was not shown as due on the assessment roll when the assessment roll was signed by the Commissioner of Internal Revenue.

The Defendant rests.

Mr. Blanche: If the Court please, I believe that we may have a stipulation from counsel for the Government to the effect that the materiality and the relevancy of the exhibits introduced by the Gov-

ernment, not as to the competency, may be raised at any time.

Mr. Jewell: So stipulated.

Mr. Blanche: Prior to the submission and filing of the brief.

The Court: So understood.

Mr. Blanche: With the consent of the counsel for the Government, I would like to make a few typographical corrections in the amended petition. The various amounts were discovered only after the first amended petition was filed.

On page 6, paragraph 7, line 25, the date should be "April 18" in lieu of "April 17."

The next correction appears on line 1, of page 7, of paragraph XIV, and it is the same correction as noted before, namely, that "April 17" is corrected to read "April 18."

The Court: Gentlemen, the date as shown on the photostatic copy of the claim and is annexed to the first amended petition on page 8 thereof, are those dates to remain the same—Under statement "H", arabic eight—

Mr. Leslie: That is on the claim, your Honor—I am sorry; I don't follow you.

(The document referred to was passed to counsel.)

Mr. Leslie: This date should be "April 18," is that the point—

The Court: Yes.

Mr. Leslie: That is correct, your Honor. That should be changed to "April 18."

The Court: Then the record shows that the change should be made on the claim which appears annexed to page 8 of the first amended petition to "April 18" instead of "April 17"—I suppose that will be true wherever the date "April 17" appears.

Mr. Leslie: I was about to suggest, your Honor, that we stipulate that where the date "April 17" appears it should be "April 18."

The Court: Is that stipulated, Mr. Jewell—

Mr. Jewell: So stipulated.

The Court: Are there any dates to be supplied in paragraph IX, page 9, beginning at line 5: "That plaintiff on or about April * * *"——

Mr. Blanche: (Interrupting): Yes, your Honor. That is April 10. That appears throughout the petition. We suggest a stipulation to the effect that "April 10" in each case be deemed to be the date.

Mr. Jewell: So stipulated. [14]

Mr. Blanche: The next correction would be page 12, paragraph XI, line 14, the figures "784,177" should be "782,474," for the reason that while a tax was paid on 784,177, the records of the company did not demonstrate that there was more than 782,474 pounds of the tire fabric thread and other materials on hand and which were consumed in the making of tires between August 1, 1933 and January 5, 1934.

The Court: That corrected figure then is 782,-474——

Mr. Leslie: Correct.

Mr. Blanche: Yes, your Honor.

The Court: Of course, the Government does not object to that. It is a lesser amount.

Mr. Jewell: I will so stipulate. I have examined the records, your Honor.

Mr. Blanche: The next correction appears on page 13, line 7; the figures "757,260" should be "705,806."

The next correction is on line 8, page 13, paragraph XII, the figure "784,177" should be "782-474."

The next correction appearing on the same page but in paragraph XIII, the figure "757,260" should be changed to "705,806."

The Court: Shouldn't that correction on line 8 of paragraph XII, read "782,477" or "474"——

Mr. Blanche: 474.

The next correction occurs on page 14, paragraph XII, line 6; the figure "757,260" again becoming "705,806."

The Court: Paragraph XIII——[15]

Mr. Blanche: Paragraph XIII, on page 14; yes, your Honor.

I believe your Honor has noted that on line 13, paragraph XIV, of page 14, "April 17" becomes "April 18."

The Court: Yes.

Mr. Blanche: With those typographical amendments, the Plaintiff rests.

Mr. Jewell: I would like the Court's permission to confer with counsel for the Plaintiff.

The Court: Very well.

(Conference between counsel.)

Mr. Blanche: Counsel for the Government, if the Court please, and counsel for the Plaintiff have suggested, subject to the Court's wishes, that counsel for the Plaintiff may have 20 days within which to file an opening brief.

I might suggest that the 20 days might start to run from Monday next, for the reason that the brief will be largely prepared in Akron, and the time of transmittal occasioned thereby will give us a little longer time.

The Court: So ordered. Twenty days from Monday—that is Lincoln's birthday—20 days from February 13th.

Mr. Blanche: Very well, your Honor.

And also it has been suggested that the Government have likewise 20 days and Plaintiff have a further 10 days.

We offer that stipulation.

The Court: So ordered. [16]

Upon the filing of the last brief, pursuant to rule, the cause will stand submitted for decision.

The record should show that the Court has indicated on the original files the first amended petition certain pencil notations in accordance with the suggested corrections, and if it is satisfactory the corrections may be made by the Clerk on the original file.

Mr. Blanche: So stipulated, your Honor.

Mr. Jewell: So stipulated.

The Court: Is that all, Mr. Hansen—

The Clerk: Yes, your Honor.

(Whereupon, at 10:40 o'clock a.m., February 10, 1940, the above-entitled matter stood submitted.)

State of California,

County of Los Angeles—ss.

I, A. Wahlberg, an official reporter of the District Court of the United States in and for the Southern District of California, Central Division, do hereby certify that the foregoing pages 1 to 17, both inclusive, comprise a duplicate copy of the original full, true and correct transcript of the testimony taken and proceedings had on the 10th day of February, 1940, in the hearing of the case of the B. F. Goodrich Company, a corporation, plaintiff, v. United States of America, defendant, No. 8138-M Civil, and that said transcript contained on said pages comprises all of the statements of counsel and of the court and ruling of the court made during the progress of said hearing on said day; and that the original of said transcript was delivered on February 20, 1940, to the Honorable Paul J. McCormick, the Judge before whom the aforementioned hearing was had.

Dated: this 29th day of January, 1942.

A. WAHLBERG

Official Reporter

[Endorsed]: Filed Jan. 29, 1942.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

* * * * *

III.

* * * * *

“Plaintiff’s only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff’s predecessor.”

* * * * *

[Endorsed]: No. 10035. United States Circuit Court of Appeals for the Ninth Circuit. The B. F. Goodrich Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 30, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals for the Ninth
Circuit

No. 10035

THE B. F. GOODRICH COMPANY, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED.

Comes now The B. F. Goodrich Company, a corporation, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this court in this case are the following:

I.

The court erred in denying plaintiff's motion to reopen case to admit further proof (record on appeal, p. 83).

II.

The court erred in that it abused its discretion in denying plaintiff's motion to reopen case to admit further proof (record on appeal, p. 83).

III.

The court erred in sustaining defendant's objection to the following stipulated testimony of the witness George Hubbell, as set forth on pages 4, 5, 9 and 10 of the stipulation of facts (record on appeal, pp. 59, 60, 64, 65) :

"That the books and records of said Pacific Goodrich Rubber Company * * * were and are kept under the supervision and control of the said George Hubbell, his duties being, among others, to keep said books and records; that he, the said George Hubbell is familiar with and knows the prices at which tires were sold by Pacific Goodrich Rubber Company at all the times mentioned in said First Amended Petition herein and is familiar with and knows whether or not there was included in the price of the tires sold by Pacific Goodrich Rubber Company during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold by Pacific Goodrich Rubber Company during said period, and is familiar and knows whether the prices at which Pacific Goodrich Rubber Company sold tires during said period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were any greater than the prices at which during said period Pacific Goodrich Rubber Company sold

tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, * * *

* * *

“* * * and that Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of tires sold during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during said period; and that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, * * *”

Defendant's objection, made on page 14 of defendant's reply brief, the original of which is included in the record on appeal, reads as follows:

“Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor.”

The court's ruling, appearing on pages 11 and 12 of the conclusions of the court on the merits of the action (record on appeal, pp. 78, 79), reads as follows:

“The burden of proving its right to refund rests throughout the action upon the plaintiff corporation and this burden is not sustained unless satisfactory evidence preponderates in plaintiff's favor, particularly that there has been no inclusion or collection by Pacific Goodrich Rubber Company of the tax in the price of the tires which have been sold by Pacific Goodrich Rubber Company. Substantially the only evidence produced upon this vital point is in the form of a stipulation entered into by Government counsel with the reservation as to its sufficiency, that the cashier and auditor of the taxpayer corporation would if called as a witness testify that he supervised, controlled and kept the books and records of the Pacific Goodrich Rubber Company at all times pertinent to this action and that he is familiar with and knows the prices at which tires were sold by the taxpayer at all applicable times; that he knows that during the period from August 1, 1933, to January 5, 1934, the taxpayer did not include or intend to include in the price of tires sold during such period any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during such

period; that the prices at which the taxpayer sold tires during such period were no greater on tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act than the prices at which during such period it sold tires containing processed cotton on which a tax was payable under Section 9 of the Triple A. No books of account or sales records were produced and no explanation for their nonproduction was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue. We are not satisfied that the required burden of the non-passage of the tax to vendees of the taxpayer has been sustained.”

In the trial of this action counsel for plaintiff and defendant stipulated as follows (reporter’s transcript, pp. 5-7, a certified copy of which is included in the record on appeal):

“Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

“By stipulation of counsel for the Government, there will be no question of a foundation raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to,

the relevancy of the facts stipulated to and of the sufficiency of the proof made.

“We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

“The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.

“It is our contention, of course, that inasmuch as the tax was not levied until some four months after the return, we were not apprised of it, we did not include it in the price of the commodity, and there is a statement to the effect that it was not covered with subsequent billing.

“This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

“Is that a correct statement, Mr. Jewell—

“Mr. Jewell: That is a correct statement.

“The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

“Mr. Blanche: Yes, your Honor.”

IV.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action was at any time acquired by plaintiff from the Pacific Goodrich Rubber Company.

V.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the plaintiff on or about June 30, 1934, in anticipation of the immediate dissolution of the Pacific Goodrich Rubber Company and as a distribution in kind of all of the assets of that company to plaintiff as its sole stockholder.

VI.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, if not acquired by plaintiff as provided in paragraph V, *supra*, or in paragraph VII, *infra*, passed to plaintiff as the sole stockholder of the Pacific Goodrich

Rubber Company upon the dissolution of that company on or about December 21, 1934.

VII.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, if not acquired by plaintiff as provided in paragraph V or VI, *supra*, was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the plaintiff on or about August 14, 1935, as a distribution in kind of all the assets of the Pacific Goodrich Rubber Company to plaintiff as its sole stockholder pursuant to the dissolution of said company on or about December 21, 1934.

VIII.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding.

That at the close of business on June 30, 1934, the officers of the predecessor in interest of the plaintiff, the Pacific Goodrich Rubber Company, in anticipation of immediate dissolution of that company, transferred and delivered over to the plaintiff possession and control of all of the property and assets

of the Pacific Goodrich Rubber Company, including the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, as a distribution in kind of all of the assets of that company to the plaintiff as its sole stockholder. That as evidence of said distribution in kind the Pacific Goodrich Rubber Company on said 30th day of June, 1934, executed a written assignment by the terms of which it assigned, transferred and set over to the plaintiff all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or would have against any and all persons, firms or corporations. That a true copy of said written assignment is set forth at lines 1-28, inclusive, page 3, of the first amended petition of the plaintiff herein. That the aforesaid action of the officers of the Pacific Goodrich Rubber Company in making said distribution in kind of all of the assets of that company to the plaintiff, in anticipation of the immediate dissolution of said company, was ratified and approved, and the dissolution of said company authorized by the Board of Directors and by the stockholders of said company on July 6, 1934. That thereafter, to wit, on August 24, 1934, the execution and delivery to the plaintiff of the aforementioned written assignment of June 30, 1934, was ratified and approved by the Board of Directors of the Pacific Goodrich Rubber Company. That following the dissolution of said Pacific Goodrich Rubber

Company on or about December 21, 1934, said company, on August 14, 1935, executed a further written assignment as a supplement to the aforementioned assignment of June 30, 1934, by the terms of which supplemental assignment said company assigned and transferred to the plaintiff all claims, demands, choses in action or causes of action of whatsoever kind or nature which it had or might later have against all persons whomsoever including in particular its claim for refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action. That a true copy of said written assignment of August 14, 1935, is set forth at line 7, page 4, to line 11, page 5, inclusive, of the first amended petition of the plaintiff herein.

IX.

The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not the Pacific Goodrich Rubber Company included or intended to include in the price of the tires sold by it during the period from August 1, 1933, through January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein.

X.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a

total absence of any evidence, competent or otherwise, to support a contrary finding:

That Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of the tires sold by it during the period from August 1, 1933, through January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein.

XI.

The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act.

XII.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires contain-

ing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act.

XIII.

The court erred in making and entering its following quoted conclusion of law No. V (record on appeal, p. 120), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary, and for the further reason that said conclusion of law is irreconcilably inconsistent to the extent that the court concludes that the right to the refund of the tax which is sought to be recovered in this action was vested in the plaintiff by reason of the two written assignments of June 30, 1934, and August 14, 1935, and at the same time concludes that said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes:

"That the right to the refund of the tax which is sought to be recovered in this action was not acquired by the plaintiff by reason of its ownership of all of the stock of the Pacific

Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to plaintiff, but vested in plaintiff by reason of the two written assignments executed by the Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively. That said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes and the plaintiff accordingly acquired no rights thereunder to the refund of the tax herein sought to be recovered. That the plaintiff also acquired no right to the refund of the tax herein sought to be recovered by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by dissolution of that company or by the distribution in kind by said company of all of its assets to the plaintiff."

XIV.

The court erred in making and entering its following quoted conclusion of law No. VI (record on appeal, p. 121), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary:

“That under Sec. 621 (d) of the Revenue Act of 1932 only ‘the person who paid the tax’ can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not ‘the person who paid the tax’ within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932.”

XV.

The court erred in making and entering its following quoted conclusion of law No. VII (record on appeal, p. 121), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary:

“That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Sec. 621 (d) of the Revenue Act of 1932.”

XVI.

That the court erred in rendering judgment for the defendant, the respondent herein (record on appeal, p. 122).

XVII.

That the judgment is contrary to law.

Appellant further states that the whole of the record on appeal, as certified by the clerk of the District Court and filed herein, including the reporter's transcript, original papers and exhibits, is deemed necessary to be printed for the consideration of the points set forth above.

Dated, this 30 day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Counsel for appellant, The
B. F. Goodrich Company

[Endorsed]: Filed Jan. 31, 1942. Paul P.
O'Brien, Clerk.

Received copy of the within Statement of Points
to be relied upon and designation of the parts of the
record to be printed, this 30 day of January, 1942.

WILLIAM FLEET PALMER

United States Attorney

By ARMOND MONROE JEWELL

Attorneys for Respondent.

[Title of Circuit Court of Appeals and Cause.]

AMENDED DESIGNATION OF THE PARTS
OF THE RECORD TO BE PRINTED.

Comes now The B. F. Goodrich Company, a corporation, the appellant in the above entitled cause, and amends its designation of the parts of the record to be printed as follows:

It is deemed necessary by appellant for the consideration of the points set forth in its statement of points filed herein, that there be printed the whole of the record on appeal, as certified by the Clerk of the District Court and filed herein (including the reporter's transcript and exhibits), but excluding the brief of plaintiff and plaintiff's reply brief filed in the lower court and also all of the defendant's reply brief filed in the lower court, except for the following quoted paragraph appearing in the next to the last paragraph of Point III of said defendant's reply brief:

“Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed: that the best evidence consists of the books and records of sales of plaintiff's predecessor.”

Dated this 26th day of February, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Counsel for Appellant. The
B. F. Goodrich Company

[Endorsed]: Filed Feb. 27. 1942. Paul P.
O'Brien, Clerk.

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No. 10035.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Facts.¹

This is an appeal from a judgment of the United States District Court, in and for the Southern District of California, Central Division, in favor of defendant-appellee upon a suit for recovery of additional manufacturer's excise tax assessed against and paid by appellant's predecessor in interest, Pacific Goodrich Rubber Company.

¹All italics ours unless otherwise noted.

Jurisdictional Facts.

Appellant, plaintiff below, is a corporation organized and existing under and by virtue of the laws of the State of New York and qualified to do business in the State of California. It filed its initial complaint in this cause in the United States District Court on October 1st, 1937, and, pursuant to stipulation and order of court [Tr. pp. 78-79], filed an amended complaint on February 5, 1940. The action was brought against the United States as defendant for the reason that John P. Carter, the Collector of Internal Revenue at Los Angeles, California, to whom the additional manufacturer's excise tax had been paid and for the recovery of which this action was brought, had died prior to the commencement of the action and on or about April 24, 1935 [Tr. p. 2, p. 50, p. 80, p. 142]. The action was one arising under the laws of the United States providing for internal revenue, particularly under Section 602 of the Revenue Act of 1932 (Act June 6, 1932, Ch. 209; 47 Stat. 261, 26 U. S. C. A. §3400) as modified by Act of May 12, 1933, Ch. 25, Section 9(a); 48 Stat. 35 (7 U. S. C. A. §609) and was for the recovery of manufacturer's excise tax on rubber tires erroneously and illegally collected by defendant [Tr. p. 6, p. 57, p. 89, pp. 141-142]. Jurisdiction of the cause was vested in the United States District Court under Judicial Code Section 24, subdivisions 5 and 20 (28 U. S. C. A. §41 (5) and (20)) and in this court on appeal under Judicial Code Sections 128 and 129 (28 U. S. C. A. §§225 and 226).

Statement of the Case.

The action was tried in the court below upon a stipulation of facts and no dispute exists between the parties thereon. The Pacific Goodrich Rubber Company, incorporated under the laws of the State of Delaware in 1927, was formally dissolved on December 21, 1934 [Tr. p. 81, p. 141, pp. 233-235]; that corporation was at all times prior to its dissolution the wholly owned subsidiary of appellant, The B. F. Goodrich Company, which held 100% of its stock [Tr. p. 82, pp. 142-143]. As a manufacturer and seller of tires, Pacific Goodrich Rubber Company (referred to for brevity as the "Pacific Company") was required to and did pay a manufacturer's excise tax under Section 602 of the 1932 Revenue Act at the rate of $2\frac{1}{4}$ cents per pound of total weight of tires sold;¹ returns were made and the tax paid monthly in accordance with the provisions of the Act (Sec. 626; 26 U. S. C. A. §3448).

On May 12, 1933, the ill-fated Agricultural Adjustment Act was passed and pursuant to Section 16(a) thereof (Act May 12, 1933, Ch. 25, Title I, §16; 48 Stat. 40; 7 U. S. C. A. §616) Pacific Company, plaintiff's predecessor in interest, was required to pay a tax upon the sale or disposition of any article processed wholly or in chief value from cotton which it had on hand on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture),

¹For the convenience of the court the particular statutes with which this appeal is concerned are set forth in the appendix to this brief in the order in which they are referred to herein.

in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, *i. e.*, \$0.044184 per pound or approximately 4½ cents per pound. [Finding VIII, Tr. p. 143]. At that time, to wit, August 1, 1933, Pacific Company held for sale or other disposition articles processed wholly or in chief value from cotton, which articles, consisting of tires, fabrics, threads and other materials, had a total content of 782,474 pounds of processed cotton. Accordingly Pacific Company pursuant to Section 16 of the Agricultural Adjustment Act prepared and filed with John P. Carter, now deceased, the then Collector of Internal Revenue for the Sixth District of California, its return reporting the sale or other disposition of said processed cotton of 782,474 pounds weight and paid the Collector a tax thereon in the total sum of \$34,648.08, computed at the rate of \$0.044184 per pound. No portion of this tax has at any time been refunded or credited to Pacific Company or to appellant, its successor in interest [Finding IX, Tr. pp. 143-144].

During the period from August 1, 1933, through January 5, 1934, Pacific Company manufactured and sold tires which contained 705,806 pounds of the aforementioned 782,474 pounds of processed cotton which were in the company's inventory on August 1, 1933, and upon which the aforementioned Agricultural Adjustment Act tax had been paid. The balance of the processed cotton was utilized in rubber products other than tires or wasted [Finding X, Tr. pp. 144-145].

In computing the manufacturer's excise tax imposed under Section 602 of the 1932 Revenue Act at the rate of 2¼ cents per pound of tires sold, Pacific Company deducted from the weight of these tires the 705,806

pounds of processed cotton contained therein on which it had paid the Agricultural Adjustment Act tax [Finding XI, Tr. pp. 145-146]. The authority for so doing the Pacific Company found in Section 9a of the Agricultural Adjustment Act (7 U. S. C. A. §609a) which provided as follows:

“Provided, That upon any article upon which a manufacturers’ sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers’ sales tax is computed on the basis of weight, such manufacturers’ sales tax shall be computed on the basis of the weight of said finished article *less the weight of the processed cotton contained therein on which a processing tax has been paid.*”¹

This computation of the manufacturer’s excise tax, wherein deduction was taken for the weight of processed cotton on which a tax had been paid under Section 16 of the Agricultural Adjustment Act, was disallowed by the Collector and on April 10, 1934, demand was made for additional manufacturer’s excise tax in the amount of \$15,880.64 together with interest thereon in the sum of \$569.74 representing a tax of $2\frac{1}{4}$ cents per pound on the said 705,806 pounds of processed cotton contained in the tires which had been sold. These amounts were paid by Pacific Company under written protest in order to avoid further penalties and interest [Finding XII, Tr. pp. 146-147].

Thereafter and on August 31, 1935, appellant and Pacific Company each filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of Cali-

¹The trial court affirmed the right of the Pacific Company to have taken this deduction in computing its manufacturer’s excise tax. [Conclusion of Law I, Tr. p. 153.]

fornia, claims for refund of this additional manufacturer's excise tax and interest thereon, in the aggregate sum of \$16,450.39, urging therein that the above-quoted provision of Section 9a of the Agricultural Adjustment Act permitting the deduction had application not alone to the so-called "processing tax" levied by Section 9a of the Act but to the equivalent and counter-part tax levied under Section 16 of the Act, the so-called "floor-stocks" tax. In the claim for refund filed by appellant it alleged its right to receive the refund by reason of an assignment made to it by the Pacific Company to which we will refer hereinafter [Finding XVIII, Tr. pp. 148-149; Exhibits D and F, Tr. pp. 199-202 and pp. 209-214]. Later, on April 21, 1936, appellant and Pacific Company filed amended claims for refund urging the same ground but affirmatively alleging that the taxpayer did not include the tax, the refund of which was claimed, in the price of the articles on which the tax was imposed nor did it collect it from the persons to whom the articles were sold [Finding XIX, Tr. p. 149; Exhibits E and G, Tr. pp. 204-208 and pp. 215-220].

These claims for refund were rejected by the Commissioner of Internal Revenue on May 22, 1936, the appellant's claims upon the ground that Pacific Goodrich Rubber Company had claimed a refund of the same taxes and that appellant's claims were therefore duplicate claims [Exhibit H-1, Tr. pp. 221-222], and the claims of Pacific Company upon the ground that in the opinion of the Commissioner the proper interpretation of Section 9a of

the Agricultural Adjustment Act did not entitle the company to a credit for floor stocks tax paid under Section 16 of the Act [Finding XX, Tr. pp. 149-150; Exhibit H-2, Tr. pp. 223-224].¹ The instant action to recover this additional manufacturer's excise tax was commenced by appellant on October 1, 1937 [Tr. p. 25].

One other matter of factual background deserves to be noted, constituting as it does one of the two grounds for the trial court's adverse decision. As mentioned above Pacific Goodrich Rubber Company was formally dissolved on December 21, 1934 [Finding I, Tr. p. 141; Exhibit J, Tr. pp. 234-235]. Prior to its dissolution it transferred all its assets, including "all rights, claims and choses in action" which it then had or might thereafter acquire, to its parent company and sole stockholder, the appellant herein. This transfer was evidenced by an assignment made on June 30, 1934 [Finding XVI, Tr. p. 148; Exhibit A, Tr. pp. 191-193], and on July 6, 1934, the board of directors and the stockholders of Pacific Goodrich Rubber Company severally ratified and confirmed the assignment and transfer to appellant of all of the assets of Pacific Company "as a distribution in kind to the stockholders" [Findings XIII and XIV, Tr. p. 147; Exhibits I and I-1, Tr. pp. 226-231]. At the same meetings the dissolution of the company was agreed upon and appropriate resolutions therefor passed [see certified copy of minutes

¹As noted above, the trial court disagreed with the Government's contention in this regard.

of directors and stockholders meetings, Tr. pp. 225-233 and Findings XIII and XIV, Tr. p. 147].

On August 14, 1935, five days before making its claim for refund of the taxes here in suit [Exhibit F, Tr. pp. 209-213], the Pacific Company purported to make a specific assignment of its claim for refund against the United States and appointed appellant its attorney in fact to make claim, demand payment and to prosecute any and all proceedings at law or in equity therefor [Exhibit B, Tr. pp. 194-195].

As will hereinafter appear, the trial court concluded that the right to the refund of the tax here in question was not acquired by appellant by reason of its ownership of all of the stock of Pacific Company or by the dissolution of that company or by the distribution of its assets in kind to its stockholders but vested in appellant by reason of the assignments above mentioned which assignments the court concluded were "absolutely null and void *ab initio* under the provisions of Section 3477 of the Revised Statutes" (31 U. S. C. A. §203), which section has the effect of nullifying except under certain conditions any purported assignment of a claim against the United States [Conclusion of Law V, Tr. p. 155]. The trial court further concluded that appellant had failed to establish that the tax for which refund is sought had not been passed on to its vendees by Pacific Goodrich Rubber Company [Conclusion of Law VII, Tr. p. 156]. Otherwise the trial court properly concluded that the credit upon the manufacturer's excise tax permitted by Section 9(a) of the

Agricultural Adjustment Act above quoted was equally applicable to the so-called "floor stocks" tax imposed by Section 16 of the Agricultural Adjustment Act [Conclusion of Law I, Tr. p. 153], and that the tax, recovery of which is here sought, was "erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company," and that it, as the taxpayer, is entitled to the refund claimed both under the applicable revenue laws and under the equitable remedy of money had and received [Conclusion of Law II, Tr. p. 154].

We address ourselves, therefore, to this court fortified with the knowledge that the appellee has received and now holds \$16,450.38 which it has erroneously and unjustly collected from appellant's predecessor, its wholly owned and now dissolved subsidiary, and which in equity and good conscience belongs to appellant and should be repaid. If we can satisfy this court (a) that the uncontradicted evidence sufficiently shows that the tax was not passed on or, to be more exact, that it was not included in the price of the articles with respect to which it was imposed and (b) that appellant is properly entitled to maintain this action for refund, the judgment of the trial court must be reversed.

Specification of Errors.

Appellant hereby specifies the particulars in which the Findings of Fact, Conclusions of Law and Judgment appearing in the transcript of record herein [Tr. pp. 140-158] are erroneous:

I. The court erred in making and entering its Conclusion of Law V [Tr. p. 155] and in concluding as a matter of law therein that the right to the refund of the tax which is sought to be recovered in this action was not acquired by appellant by reason of its ownership of all of the stock of Pacific Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to appellant. The court further erred therein in concluding as a matter of law that the right to refund of said tax vested in appellant by reason of the two written assignments, dated respectively June 30, 1934, and August 14, 1935, executed by Pacific Goodrich Rubber Company in favor of appellant, and then concluding that said assignments to the extent they constituted assignments of a claim against the United States were absolutely null and void *ab initio* under the provisions of Section 3477 of the Revised Statutes. That therein said conclusion of law is irreconcilably inconsistent.

II. The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax sought to be recovered in this action

was at any time acquired by appellant from the Pacific Goodrich Rubber Company.

III. The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the said manufacturer's excise tax was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the appellant on or about June 30, 1934, in anticipation of the immediate dissolution of the Pacific Goodrich Rubber Company and as a distribution in kind of all of the assets of that company to appellant as its sole stockholder, or that said right to refund was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the appellant on or about August 14, 1935, subsequent to the dissolution of said company and as a distribution in kind of this asset to appellant as the sole stockholder of the dissolved corporation.

IV. The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the said manufacturer's excise tax, if not acquired by appellant by virtue of said assignments, passed to appellant as the sole stockholder of the Pacific Goodrich Rubber Company upon the dissolution of that company on or about December 21, 1934.

V. The court erred in making and entering its Conclusion of Law VII [Tr. p. 156] and in concluding as a matter of law therein that appellant had failed to establish that the tax, the refund of which is sought by this action,

was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Section 621(d) of the Revenue Act of 1932.

VI. The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not Pacific Goodrich Rubber Company in fact included in the price of the tires sold by it from August 1, 1933, to January 5, 1934, on which it had paid a tax under Section 16 of the Agricultural Adjustment Act, any amount to cover any manufacturer's excise tax upon the weight of processed cotton contained therein [Tr. p. 91].

VII. The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of the tires sold by it from August 1, 1933, through January 5, 1934, on which it had paid a tax under Section 16 of the Agricultural Adjustment Act, any amount to cover any excise tax on the weight of processed cotton contained therein [Tr. p. 91].

VIII. The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich

Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act [Tr. p. 91].

IX. The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act [Tr. p. 91].

X. The court erred in sustaining appellee's objection to or in refusing to consider the stipulated testimony of the witness George Hubbell as set forth in the Stipulation of Facts at transcript pages 83-85, 90-92, on the ground that the same was secondary or not the best evidence.

The substance of said testimony was that the books and records of Pacific Goodrich Rubber Company were and are kept under the witness' control and supervision; that

he was familiar with and knew the prices at which tires were sold by Pacific Goodrich Rubber Company and knew whether or not there was included in the price of the tires sold from August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in the tires sold during said period [Tr. pp. 84-85] * * * that Pacific Goodrich Rubber Company did not in fact include or intend to include in the price of tires sold by it between August 1, 1933, and January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein and that the prices at which it sold tires during said period on which a "floor stocks" tax had been paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it had sold tires on which a "processing tax" had been paid under Section 9(a) of that Act [Tr. p. 91].

Appellee's objection thereto, made after the conclusion of the trial, appears in its reply brief, the original of which is included in the record on appeal, and reads as follows:

"Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). *The Government objects to the materiality of these statements* on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor." [Tr. p. 263.]

The court's ruling on the objection appears in its opinion, "Conclusions of the Court on the Merits of the Action":

"No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue." [Tr. p. 108.]

XI. The court erred in making and entering its following quoted Conclusion of Law VI [Tr. p. 156] for the reason that said conclusion of law is contrary to law:

"That under Sec. 621(d) of the Revenue Act of 1932 only 'the person who paid the tax' can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not 'the person who paid the tax' within the meaning of that phrase as used in Sec. 621(d) of the Revenue Act of 1932."

XII. The court erred in denying appellant's motion to reopen the case to admit further proof [Tr. pp. 110-135].

XIII. The court erred in that it abused its discretion in denying appellant's motion to reopen the case to admit further proof [Tr. pp. 110-135].

XIV. That the judgment is contrary to law.

Summary of Argument.

1. The sole stockholder of a dissolved corporation to whom the assets of the corporation have been transferred pursuant to the dissolution is a transferee by operation of law and not within the prohibition of Revised Statutes Section 3477.

2. Where the undisputed evidence shows and the court finds that an additional tax was assessed and collected long after the articles, upon the sale of which it was imposed, have been sold and that the manufacturer and seller did not know or contemplate that the additional tax applied to it and that it did not subsequently bill or collect the additional tax from its vendees, it cannot be said that the evidence does not fairly establish that the additional tax was not added to the price of the articles sold.

3. If it is established that the additional tax was not added to the price of the articles sold it matters not under Section 621(d) of the Revenue Act of 1932 that that fact is established by the successor in interest of the person who paid the tax, particularly when those facts are established by the agent and employee of the corporate taxpayer testifying from its own books and records.

4. When objection is made for the first time after the conclusion of a trial that certain pertinent evidence introduced is not the best evidence and the objection is sustained, it is reversible error for the trial court to deny a motion to reopen to permit the introduction of the primary evidence.

I.

**Appellant as Transferee by Operation of Law and as
Sole Stockholder of the Dissolved Taxpayer Could
Properly Maintain This Action for Refund.**

Initially it is incumbent upon appellant to convince the court of its right in the first instance to prosecute this action for the recovery of taxes paid by its predecessor, Pacific Goodrich Rubber Company.

We have already adverted to the fact that appellant, during all times that the Pacific Company was in existence, owned all of its issued and outstanding capital stock [Findings VI and VII, Tr. pp. 142-143]; we have further remarked that the Pacific Company was formally dissolved on December 21, 1934 [Exhibit J, Tr. pp. 234-235; Finding of Fact I, Tr. p. 141] and that this corporate action was taken pursuant to resolutions of the stockholders [Exhibit I-1, Tr. pp. 229-230] and of the board of directors [Exhibit I, Tr. pp. 226-228]. Pursuant to its impending dissolution the Pacific Company transferred all of its assets to its sole stockholder, the appellant herein, by an assignment dated June 30, 1934 [Exhibit A, Tr. pp. 191-193]. The resolutions directing the dissolution, adopted one week later, expressly confirmed and ratified the assignment "*as a distribution in kind to the stockholders of all the assets of this corporation*" [resolutions of the board of directors, Exhibit I, Tr. p. 228, and resolutions of the stockholders, Exhibit I-1, Tr. p. 230. See, also, resolution of the board of directors adopted August 24, 1934, further expressly ratifying the assignment, Tr. pp. 231-233]. The court found these various components of Exhibit I to be true and correct copies of the minutes of the respective meetings [Findings XIII, XIV and XV,

Tr. p. 147], and by statute certified copies of the minutes of a corporation are themselves *prima facie* evidence “of the facts or action stated therein” (Calif. Civil Code, §371; *People v. Ratliff*, 131 Cal. App. 763, 773; 22 Pac. (2d) 245).

As will appear, it is demonstrably clear that the trial court erred in concluding that the assignment, to the extent it constituted an assignment of a claim against the United States, was “absolutely null and void *ab initio* under the provisions of Sec. 3477 of the Revised Statutes” and, in contradiction thereto, that the right to the refund vested in appellant *by reason of the assignment* and not by reason of its ownership of all the stock of Pacific Company, by the dissolution of that company and by the distribution in kind of all its assets to its sole stockholder, the appellant [Conclusions of Law V, Tr. p. 155].¹ There is no escape from the proposition that the assignment of this claim against the United States was either valid as a transfer by operation of law, to which point we shall address ourselves in a moment, or it was, as the trial court concluded, void and of no effect so far as concerned the claim against the United States, *in which latter case the claim for refund which, by hypothesis it had failed effectively to transfer, remained as an asset of Pacific Company*² and hence passed to appellant, the sole stockholder,

¹Note in this connection our Specifications of Errors Nos. II and III in which we claim error on the part of the trial court in failing to make any finding upon this vital issue as to whether the assignment was or was not in fact a distribution in kind of all of its assets by the taxpayer to its sole stockholder.

²Note, that the effect of Section 3477, Revised Statutes, is such as to make an attempted assignment void *inter partes* as well as void as against the United States. *Spofford v. Kirk*, 7 Otto. 484, 24 L. Ed. 1032, 1034. And the assignor is left in the same position it would have been had no assignment been made. *H. M. O. Lumber Co. v. United States* (D. C. Mich.), 40 Fed. (2d) 544, 545.

on the dissolution of the Pacific Company in December, 1934. Certain it is that the Pacific Company, which has neither *de jure* nor *de facto* existence and is as legally extinct as a dead man,¹ no longer owns its erstwhile claim against appellee. It passed to its stockholder in 1934 either pursuant to the assignment in June (and necessarily if such be the case the assignment could not have been "null and void *ab initio*") or pursuant to the dissolution in December. "When a corporation is dissolved its assets do not vanish and its debtors are not absolved or released." (*Wilner Friends Credit Assn. v. Scheffres*. 175 Misc. 909, 25 N. Y. S. (2d) 664, 666.)

IF IT DID NOT PASS BY THE ASSIGNMENT, THE RIGHT
TO THE REFUND PASSED AUTOMATICALLY TO ITS
STOCKHOLDER ON DISSOLUTION.

Upon dissolution, title to the corporate assets vests automatically and by operation of law in its stockholders.

19 C. J. S., "Corporations," Section 1730, page 1489:

"In the absence of statute, the legal title to property belonging to the corporation passes *by operation of law* to the stockholders, who are the beneficial owners through the corporation, and who take as tenants in common,"

16 *Fletcher Cyc., Corps.* (Perm. Ed.), Section 8134, page 878:

"On dissolution, the legal title to land passes to the stockholders, and title to the corporate property vests in the stockholders as tenants in common and is sub-

¹"Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person." *Chicago Title & Trust Co. v. Forty One Thirty Six Wilcox Building Corp.*, 302 U. S. 120, 125, 82 L. Ed. 147, 150.

ject to their contract if all debts have been paid and no receiver has been appointed. The sole stockholder in a dissolved corporation has such an interest in its property as may pass by will. Choses in action passing to the stockholders as part of the corporate assets may be enforced by them in their own names."

13 *Am. Juris.*, "Corporations," Section 1352, page 1197:

"Stated in another way, the rule is that after the dissolution of a corporation, its property passes to its stockholders subject to the payment of the corporate debts.

"In accordance with these principles, a dissolution of a private corporation entirely changes the character of the property interest of its stockholders. It destroys their stock as such and under the modern equitable view substitutes the thing which their stock represented—that is, an interest in the corporate property. Indeed, there is ample authority for the doctrine that the stockholders of a corporation, when its existence ceases, become vested with a legal title to its property as tenants in common."

Wells Fargo Bank v. Blair, Commissioner of Internal Revenue (9th C. C. A.), 26 Fed. (2d) 532, 534:

"The California courts, construing section 400 of the Code, hold that the trustees have no legal title to the assets of the corporation, but that upon dissolution the legal title to the assets of the defunct corporation is vested in the stockholders."

Gardiner v. Automatic Arms Co. (D. C. N. Y.), 275 Fed. 697, 700:

"Upon dissolution, the legal title of the property of the corporation passes to the stockholders subject to

the payment of the debts of the corporation. *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; *Stearns Coal Co. v. Van Winkle*, 221 Fed. 590, 137 C. C. A. 314; *Boyd v. Hankinson*, 92 Fed. 49, 34 C. C. A. 197; 14A *Corpus Juris*; *Doherty v. Rice* (C. C.), 186 Fed. 204, 212, affirmed 184 Fed. 878, 107 C. C. A. 202; *Greenwood v. Union Freight R. R. Co.*, *supra*; sections 54 and 84, Corporation Law of New Jersey.”

Pewabic Mining Co. v. Mason, 145 U. S. 349, 356, 36 L. Ed. 732, 734:

“In 1883 the Pewabic Mining Company ceased to exist; its property then belonged to the different stockholders as tenants in common.”

See, also, to the same effect:

Barker v. Edwards (9th C. C. A.), 259 Fed. 484, 488;

Stearns Coal & Lumber Co. v. Van Winkle (6th C. C. A.), 221 Fed. 590, cert. den. 241 U. S. 670, 60 L. Ed. 1230.

And such is the law of Delaware, the state of incorporation of the Pacific Company.

Diamond State Iron Co. v. Husbands, 8 Del. Cr. 205, 68 Atl. 240;

Wilmington & R. R. Co. v. Doxeward (Del. 1888), 14 Atl. 720, 724;

Pontiac Trust Co. et al. v. Newell, 266 Mich. 490, 254 N. W. 178, 181.

In the last cited case it was urged that plaintiff, Nisbett, a principal stockholder of Michigan Refining Works, Inc.,

a Delaware corporation, had not standing in court; page 181:

“Defendants contend plaintiff Nisbett has no standing in court; that the Delaware corporation has been dissolved. Plaintiff Nisbett was the principal stockholder of the Delaware corporation, prior to its dissolution.”

To which the court replied, page 181:

“Dissolution merely has the effect of passing the title of the corporate property, subject to the rights of creditors, to the stockholders, or members of the corporation. *Dissolution of a corporation does not destroy its property. It effects a transfer thereof to those whom the law recognizes as the beneficial owners thereof.* So, if the corporation here involved has been dissolved, plaintiff Nisbett became beneficially interested in its assets and as a person beneficially interested in such assets had a right to invoke the aid of the court for the protection of such property from misappropriation by defendants.”

In *Federal Real Estate etc. Co. and Hugh J. Phillips v. United States*, 79 Ct. Cl. 667, where action was brought against the United States to recover damages for the closing of a right of way in which action the plaintiffs were a dissolved Delaware corporation and its sole stockholder, the court in permitting recovery held that the plaintiff, Phillips, as sole stockholder of the dissolved corporation which had owned the damaged land, was the proper party to sue; page 677:

“The authorities are practically uniform in holding that on the dissolution of a corporation the legal title to the property of the corporation rests in the stockholders. It is true that in most of the cases so

holding the court found that there were no creditors and that in the case at bar no such finding can be made and possibly the presumption is that there were some creditors. We do not think that this alters the rule or prevents a sole stockholder from beginning a suit to recover on a chose in action belonging to the corporation.”

Page 678:

“The legal title to the property which the corporation had in the first instance acquired must be in some party. It cannot be in the corporation, for the corporation having been dissolved by and under the authority of the State, can no longer have title to the property. This seems to be conceded on the part of the defendant. It cannot be in a receiver, for no receiver has been appointed. It cannot be in any creditor, for they have only equitable rights. We think that in the case at bar the legal title must rest in Hugh J. Phillips, who was president and sole stockholder. Having the legal title, it follows that he had the right to commence this suit and could commence it in his own name.”

As the sole party in interest following the dissolution of the Pacific Company and as the owner by operation of law of the right to the claim for refund, it is manifest that even upon the supposition that the assignment was in fact void as in violation of Revised Statutes Sec. 3477, appellant inherited the right to recover the taxes wrongfully collected by defendant by virtue of the dissolution alone, or as was stated in *Morgenthau v. Fidelity & Deposit Co. of Maryland* (U. S. Ct. of Appeals for the Dist. of Col.), 94 Fed. (2d) 632, 636, when a similar

contention was made that an assignment of a claim against the government was void under R. S. Sec. 3477:

“So far as a legal assignment is concerned, much may be said in favor of this contention, but we do not have to pass on this point because R. S. §3477 has never been construed to apply to assignments by operation of law. * * * *Accordingly, we may ignore the assignment by Durso to the surety and regard only the assignment which, on account of the situation of the parties, the law has effected.*”

DISTRIBUTION IN KIND BY A CORPORATION PURSUANT TO DISSOLUTION IS A TRANSFER BY OPERATION OF LAW.

However, be that as it may, it is clear both upon reason and the authorities that the assignment of its assets by Pacific Company under the circumstances as disclosed by the undisputed evidence in this case was not such an assignment as falls within the prohibition of R. S. §3477 (31 U. S. C. A. §203).

It has been uniformly held from the United States Supreme Court to the chief counsel of the Bureau of Internal Revenue¹ that the prohibition against assignment of claims against the United States has no application to assignments by operation of law.

The reasons underlying §3477 of the Revised Statutes were early expressed by Mr. Justice Miller in *Goodman v. Niblack*, 12 Otto 556, 26 L. Ed. 229, 231:

“Those mischiefs, as laid down in that opinion, and in the others referred to, were mainly two:

¹G. C. M. 21058; 1939-1 C. B. part I, p. 280, considered *infra*, pp. 58-59.

“First. The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

“Second. That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress as desperate cases when the reward is contingent on success, so often suggest.”

and assignments by operation of law were shown to be without the scope of the dangers sought to be guarded against:

“The language of that statute includes ‘All transfers and assignments of any claim upon the United States or of any part thereof or any interest therein.’ These words are broad enough, if such were the purpose of Congress, to include transfers by operation of law or by will. Yet in that case we held it did not include transfers by operation of law or in bankruptcy, and we said it did not include a transfer by will. *The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim.* That in such cases the exigencies of the party who held the claim justified and required the transfer that was made.”

The assignment on June 30, 1934, of all of the assets of the Pacific Company to its parent and sole stockholder was clearly anticipatory to and in contemplation of its

impending dissolution. If further proof of this fact were needed than the natural inference¹ to be drawn from the fact of distribution of all of its assets to its stockholders within six months of its formal dissolution it is to be found in Exhibit I and I-1 from whence it appears that the ratification of this assignment one week after its date by the board of directors and the stockholders was predicated upon the proposed dissolution and "as a distribution in kind to the stockholders of all the assets of this corporation" [Tr. p. 228, p. 230].² That such a transfer is not within the prohibition of the statute has been repeatedly held by the courts.

Novo Trading Co. v. Commissioner of Internal Revenue (2nd C. C. A.), 113 Fed. (2d) 320, is closely in point. Petitioner was a corporation, all the stock of which was held by three stockholders. By June 22, 1932, all its obligations had been paid and most of its physical assets disposed of. On that date its three stockholders, who were also its only officers and directors, entered into a formal written agreement which recited that they "have agreed to dissolve said corporation and liquidate its affairs" in the manner therein set forth. A certificate of dissolution was executed by the stockholders but was never filed with the Secretary of State with the result that the corporation was not formally dissolved although remaining dormant and inactive. The remaining assets of

¹See *Kennemer v. Commissioner of Int. Rev.* (5th C. C. A.), 96 Fed. (2d) 177, 178, where the court observed (p. 178):

"It is not material that the distribution was not specifically designated as a liquidating dividend or that no formal resolution to liquidate or dissolve the corporation had been adopted when the distribution was made. *An intention to liquidate was fairly implied from the sale of all the assets and the act of distributing the cash to the stockholders.*"

²Note, again, the effect of Calif. Civil Code Sec. 371 making this recital *prima facie* evidence of the facts stated.

the corporation, which included a claim against the United States for refund of illegally collected import duties which the corporation had paid under protest, were by the written agreement referred to, distributed among the three stockholders.

The claim for refund was subsequently allowed in 1934 and a check therefor drawn to the order of the corporation. Question was presented whether this constituted taxable income of the corporation in that year. If the transfer of assets to the stockholders in 1932 included the claim for refund and the transfer was not void to that extent under §3477 of the Revised Statutes the refund would be income of the distributees rather than of the corporation. In reversing an order of the Board of Tax Appeals holding the refund to be income of the corporation, the court stated (p. 321):

“We think it clear that the liquidation agreement was intended to effect a distribution in kind of all the remaining assets of the corporation. Certain assets were allotted to the stockholders severally; the claim for duty refunds was allotted to them jointly. the net proceeds thereof, when collected, to be distributed in equal shares.

* * * * *

“Since they were the only persons having any interest in the remaining corporate assets, there is no reason for not giving effect to their intention to have the agreement operate as an assignment by the corporation.” (Citing cases.)

and the court concluded that the transfer was not within the prohibition of Revised Statutes §3477, page 322:

“It remains to consider whether the transfer is rendered void by the statute in respect to assignment

of claims against the United States, 31 U. S. C. A. §203. *The assignment only passed legal title to parties who already owned the entire beneficial interest in the claim. Such an assignment is not within the evils at which the prohibitions of the statute are directed.* Kingan & Co. v. United States, Ct. Cl., 44 F. (2d) 447; Consolidated Paper Co. v. United States, Ct. Cl., 59 F. (2d) 281; see also Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229; Seaboard Airline Ry. v. United States, 256 U. S. 655, 41 S. Ct. 611, 65 L. Ed. 1149; Martin v. National Surety Co., 300 U. S. 588, 594, 57 S. Ct. 531, 81 L. Ed. 822. Hence the assignment was valid and the refund collected in 1934 was not income of the petitioner.”

Strikingly close in point is a recent decision of the District Court in Pennsylvania. *Roomberg v. United States*, 40 Fed. Supp. 621. This was a suit by Roomberg, formerly the sole stockholder of the Ambassador Shirt Company, a corporation, which had ceased doing business in March, 1937, when the plaintiff took over all its assets and assumed its liabilities. In August, 1937, it was formally dissolved and its charter discontinued. During the year 1933 there was assessed against the corporation a floor stocks tax on cotton articles processed wholly or in chief value from cotton, pursuant to the provisions of the Agricultural Adjustment Act. A claim for refund of these taxes was made by the corporation under appropriate provisions of the Revenue Act of 1936, §§902 and 903 (7 U. S. C. A. §§644 and 645) and upon its rejection plaintiff in 1940 instituted this action for recovery of the tax with interest. Motion to dismiss was filed by the government upon the joint ground that under the refund provisions of the 1936 Revenue Act only the person pay-

ing the tax could secure a refund and that the transfer of the claim from the corporation to its stockholder was void under Revised Statutes §3477.

In denying the motion to dismiss the court observed, after quoting from the *Novo Trading Corporation* case above (p. 623):

“In the instant case it is undisputed that Roomberg was the sole stockholder in the corporation, and thus the sole beneficial owner of the assets of the corporation.

* * * * *

“Section 3477 of the Revised Statutes is designed to protect the United States of America against conditions which do not appear to exist in this case. As was clearly stated in the leading early case of *Goodman v. Niblack*, 102 U. S. 556, 560, 26 L. Ed. 229, the Supreme Court of the United States pointed out that the mischiefs designed to be remedied by Section 3477 were mainly two: ‘First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. Second, that by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.’ ”

And after quoting from *Kingan & Co. v. United States* and *Seaboard Airline Ry. v. United States*, consolidation

cases to which we shall refer below, the court concluded (p. 625):

“Obviously, in this case, the government has to deal with only one real party in interest and cannot possibly be subjected to any claim by any other source. Substantial justice requires that the motion to dismiss be denied, and accordingly the motion is denied.”¹

ANALOGY OF THE CONSOLIDATION CASES.

Not distinguishable in substance from the dissolution cases above are those cases wherein the transfer of a claim against the government has been incidental to the merger or consolidation of the corporation owning the claim.

Seaboard Airline Railway v. United States, 256 U. S. 655, 65 L. Ed. 1149. Appellant sued in the Court of Claims to recover balances for transportation services originally payable to the Florida Central and Peninsular Railroad Company to whose rights it had succeeded through merger or consolidation. Holding that because of Revised Statutes §3477, appellant could not maintain the action, that court dismissed its petition. In reversing the judgment, the court speaking through Mr. Justice McReynolds stated, page 657 (1150 of 65 L. Ed.):

“We cannot believe that Congress intended to discourage, hinder, or obstruct the orderly merger or consolidation of corporations as the various states might authorize for the public interest. There is no probability that the United States could suffer injury

¹See in this connection *Western Knitting Mills v. United States*, 2 Fed. Supp. 119, 126, cert. den. 290 U. S. 639, 78 L. Ed. 556, wherein the taxpaying corporation was held estopped from asserting a claim against the United States for recovery of taxes overpaid which had been refunded to its sole stockholder and successor in interest.

in respect of outstanding claims from such union of interests, and certainly the result would not be more deleterious than would follow their passing to heirs, devisees, assignees in bankruptcy, or receivers, all of which changes of ownership have been declared without the ambit of the statute. The same principle which required the exceptions heretofore approved applies here.”

Phillips, Collector of Internal Revenue v. Lyman H. Howe Films Co. (3rd C. C. A.), 33 Fed. (2d) 891. In this action to recover corporate income taxes overpaid by a corporation subsequently merged into the plaintiff company the court observed pertinently, page 892:

“Without discussing the speculative question as to just when and how the rights, liabilities, and properties of the merging companies passed to the merged one, it suffices to say that in the relation of taxpayer and government it is clear that the same shareholders, the same subject-matter, and the several rights and liabilities of taxpayer and government continued in unbroken continuity from the time the government wrongfully collected the tax until the taxpayer brought this suit. The merger was a permissible proceeding under the state law. It introduced no new parties; it was a mere readjustment of relation of the original shareholders among themselves. *The wrong done those shareholders by the unjust collection of the taxes from one of the merging companies continued to be a wrong suffered by them as shareholders of the merged company.* Regarding substance and not mere corporate form, it is clear to us that the filing of the required statutory waiver was the right of the shareholders of the merged corporation.”

Kingan & Co. Inc. v. United States, (Ct. Cl.), 44 Fed. (2d) 447. Kingan & Co. Limited, a British corporation, had a claim for refund for taxes overpaid the United States in 1917. In 1920 the plaintiff, a domestic corporation, was formed to take over and operate all properties in the United States of the English company, the stockholders of which became the stockholders of the new company. Following its incorporation formal written assignment was made to the new company of all assets of Kingan & Co. Limited located in the United States. In permitting the new company to prosecute the claim for refund of taxes paid the court stated, page 451:

“The facts in this case are strikingly analogous to those which gave rise to the case of the Seaboard Airline Railway v. United States, *supra*. After the reorganization in this case, the same stockholders were in control of the plaintiff as were in control of Kingan & Co., Limited, and their stockholdings in the two companies were in the same proportion. *In substance therefore there was really no transfer of the subject-matter of the claim in question, for, although the bare legal title to the claim might have passed from Kingan & Co., Limited, to the plaintiff under the deeds referred to in the facts, the equitable ownership of the claim at all times reposed in the same individuals, that is, in the hands of the same stockholders.* Clearly, no fraud could be perpetrated upon the Treasury in a transaction of this kind. All of the reasons advanced in *Seaboard Airline Railway v. United States, supra*, are alike applicable here, for certainly Congress did not intend to discourage or obstruct an orderly reorganization under the laws of the various states any more than it intended to discourage and obstruct orderly merger or consolidation

of corporations under these laws. *There is also no probability that the United States could suffer injury in respect of outstanding claims from such a reorganization as is brought about by the facts in this case, and the result would not be more deleterious than would follow the claim passing to heirs, devisees, assignees in bankruptcy, or receivers.* Accordingly, we are of opinion that the plaintiff is entitled to maintain this suit."

Of like effect are the following additional cases:

Monarch Mills v. Jones, Collector of Internal Revenue (D. C. So. Car.), 56 Fed. (2d) 180, 183, aff'd 59 Fed. (2d) 502;

Consolidated Paper Co. v. United States (Ct. Cl.), 59 Fed. (2d) 281, 288, cert. den. 288 U. S. 615, 77 L. Ed. 988;

Western Pacific Railroad Co. v. United States, 268 U. S. 271, 275, 69 L. Ed. 951, 953;

G. C. M. 21085, 1939—1 C. B. part I, p. 280—
Opinion of Chief Counsel, Bureau of Internal Revenue.

The assignment of June 30, 1934, of all the assets of the Pacific Company to its sole stockholder anticipatory to the dissolution of the taxpayer is clearly not such a transfer as falls within the prohibition of R. S. §3477.¹

It may be argued, however, that the assignment being made prior to dissolution, notwithstanding the recital of

¹As a corollary, note that the government in turn can recover unpaid corporate taxes from the stockholders to whom the corporation assets have been distributed on dissolution. *Wonder Bakeries Co. v. United States* (Ct. Cl.), 6 Fed. Supp. 228, 233; *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 592, 75 L. Ed. 1289, 1294.

the resolutions of the board of directors and of the stockholders to the contrary, was not in fact a "distribution in the resolutions of the board of directors and of the stockholders" pursuant to dissolution but was an attempted voluntary assignment having no relation to the subsequent dissolution.¹ If such be the contention then assuredly the assignment [Exhibit B, Tr. pp. 194-195] made on August 14, 1935, of this particular claim for refund (as if to resolve any doubt about its having passed under the 1934 general assignment) was unqualifiedly a distribution of this asset in kind to appellant, the sole stockholder of the then dissolved taxpayer corporation.

Lest it be lost sight of in the discussion of the technical niceties as to whether the appellant acquired its right to maintain this action under one or other of the assignments or *ex proprio vigore* by the dissolution of the Pacific Company, we again reiterate the basic fact that the appellee has in its possession \$16,450.39 which, as found by the trial court [Tr. pp. 148, 154], was wrongfully collected and which by necessary hypothesis belongs to either a corporation which has had no existence in law or in fact for some eight years past or to the appellant, its transferee and sole stockholder. The result of the trial court's decision in this respect is to stultify and render meaningless its conclusion that the additional tax was "erroneously, illegally and unjustly demanded and collected from plaintiff's predecessor in interest" [Conclusion of Law II, Tr. p. 154] for the taxpayer being now extinct and having, moreover, hitherto transferred its claim, the government will necessarily retain its improper gains if the judgment stands.

¹Note again the language of the court in *Kenemer v. Commissioner of Int. Rev.* (5th C. C. A.), quoted *supra* at p. 26.

II.

The Uncontradicted Evidence Establishes That the Tax Was Not Added to the Price of the Tires With Respect to the Sales of Which It Was Imposed.

As a second ground for its decision adverse to the appellant the trial court concluded that appellant had failed to establish that the tax, the refund of which is here sought, was not passed on¹ to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Section 621(d) of the Revenue Act of 1932 [Conclusion of Law VII, Tr. p. 156].

The section in question, which is part of the chapter of the 1932 Act imposing a manufacturer's excise tax provides, so far as is here pertinent:

"No overpayment of tax under this chapter shall be credited or refunded * * * in pursuance of a court decision or otherwise, unless the person who paid the tax establishes * * * that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee."

The reason for the limitation, which is a frequent one in the Revenue Laws,² is apparent: a taxpayer would be unjustly enriched if he were permitted to recover taxes paid to the Government, the amount of which he had already passed on to his vendees;³ hence the duty is cast

¹We again emphasize that the criterion to be applied is not, under Sec. 621 (d), whether the tax was "passed on" but whether or not it was included "in the price of the article with respect to which it was imposed."

²See Section 424 of the 1928 Revenue Act and Section 902 of the 1936 Revenue Act (7 U.S.C.A. § 644), the latter relating to refunds of taxes paid under the Agricultural Adjustment Act.

³*Anniston Mfg. Co. v. Davis, Collector*, 301 U. S. 337, 81 L. Ed. 1143; *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 78 L. Ed. 859.

upon him, as a condition precedent to recovery, of establishing that the tax has not been passed on to others.

Preliminarily, it may be observed that the conclusion of the court that appellant had not sustained this burden is not based upon any conflict in the evidence nor was there any evidence or finding by the court that the additional manufacturer's excise tax assessed against the Pacific Company was in fact passed on.¹ The conclusion of the trial court complained of was simply that the evidence adduced did not sustain the affirmative fact that the tax had not been passed on.² That the trial court erred in so concluding we believe can be conclusively proven.

The articles upon which the floor-stocks tax was paid, the weight of the cotton content of which the Pacific Company deducted in computing its manufacturer's excise tax, were all sold by it between August 1, 1933, and January 5, 1934 [Findings X and XI, Tr. pp. 144-146]. Notice of the rejection of this method of computation of its manufacturer's excise tax and the disallowance of the deduction it had taken was not given until April 10, 1934 [Finding XII, Tr. p. 146], *after the Pacific Company had sold the articles on which it paid the tax and before it had notice of the additional assessment*. A more perfect case of the manifest impossibility of the tax in question having been "included in the price of the article with respect to which it was imposed," it would be difficult to conceive, *where not until after the sales had been concluded was the seller apprised that they carried the additional tax*.

¹Note in this connection, likewise, our Specification of Errors Nos. VI, VII, VIII and IX in which we claim that the trial court erred in failing to make any finding upon this issue.

²This does not call upon the appellate court to review the evidence or to settle conflicts therein but rather to determine the legal significance to be given to the facts adduced. *Campana Corp. v. Harrison* (7th C.C.A.), 114 Fed. (2d) 400, 406; *United States v. Jefferson Electric Mfg. Co.*, *supra*.

Nor are we prostituting the truth in the guise of logic: the evidence showed [Tr. pp. 90-92] and the court found [Finding XXII, Tr. pp. 151-152]:

“That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer’s excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9 (a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9 (a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and $2\frac{1}{4}$ cents per pound on the remaining weight of said tires; *that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer’s excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer’s excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires,*

and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them."

In further support of the fact that the tax was not passed on to the vendees of the tires with respect to the sale of which the additional tax was imposed is the uncontradicted and stipulated evidence

"that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act." [Tr. p. 91.]¹

The question as to whether or not under many varying circumstances the manufacturer has adequately sustained his burden of proving that the tax has not been passed on has been before the United States courts on many occasions but never to our knowledge has it been held that the taxpayer has not sufficiently established his absorption of the tax where his liability for the payment of it was not known or contemplated at the time of sale.

In *Campana Corporation v. Harrison* (7th C. C. A.), 114 Fed. (2d) 400, where refund was sought of an addi-

¹Hence, demonstrating that the tires with respect to which the additional tax was subsequently assessed and paid carried no greater margin of profit at the time of their sale than those tires as to which no question existed of the manufacturer's right to deduct from its manufacturer's excise tax the weight of cotton on which the "processing" tax, as opposed to the "floor stocks" tax, had been paid under Section 9-a of the Agricultural Adjustment Act.

tional manufacturer's excise tax, the court, in affirming the trial court's finding that the additional tax had not been passed on, remarked (p. 407):

"The July, 1933, invoices only represented that the \$8.80 figure represented the selling price, but as a matter of fact the accounting records and taxpayer's admission show that the original tax (or 13¢ in this instance) was collected from the wholesalers. Nor could the invoices have represented that the \$8.80 figure represented an 80¢ or 67¢ tax, for the additional tax (67¢ in this instance) was not assessed until two years later and hence could not have been collected before that time."

Page 408:

"If the taxpayer here had collected an 80¢ tax from the Sales Company and then the Sales Company had represented to the wholesalers that the \$8.80 price included an 80¢ tax, then taxpayer would not be heard denying that a portion of the price represented 80¢ tax. But the truth of the matter is that the additional tax (*i. e.*, 67¢ in this instance) was neither assessed until two years later nor then collected by the taxpayer from the Sales Company or the wholesalers."

In *Skinner v. United States* (D. C., Ohio), 8 Fed. Supp. 999, another suit for recovery of illegally collected manufacturer's excise taxes, the court, in awarding judgment for plaintiff, observed (p. 1004):

"Not only is there the sworn testimony of plaintiff to this effect, but an analysis of the exhibits attached to the stipulation, (Exhibit No. 1) having particular reference to the correspondence back and forth between plaintiff and his representatives and the Com-

missioner of Internal Revenue, *shows almost conclusively that plaintiff, in the nature of things, could not and would not have added any sum to be paid by the vendees, to be later applied by plaintiff in the payment of taxes, for the reason that before February 7, 1933, the plaintiff had been, as shown by Plaintiff's Exhibits 1-B and 1-E, repeatedly assured that there was no tax by him to be paid on his retreaded tires.* The first notice that plaintiff had of a ruling by the Commissioner that he was liable for a tax on retreaded tires was the letter to him from the Commissioner dated February 7, 1933 (Exhibit No. 1-F)."

Page 1005:

"The tax assessed in the instant case was for the taxable period covered by the month of February, 1933, to wit, from February 1, 1933, to February 28, 1933, inclusive. Certainly up until February 7, 1933 (and it appears most probable not until after the end of that period, to wit, February 28, 1933), there had been no final indication to plaintiff herein that the article which he was selling would be subject to any tax, and consequently it would seem that, when plaintiff testifies that he has not included the tax in the price of the article and has collected nothing by way of this tax from his vendees during the period in question, his statement should be taken as true and correct in the light of the circumstances as they existed at the time."

In *Con-Rod Exchange, Inc. v. Henricksen* (D. C., Wash.), 28 Fed. Supp. 924, an action for the recovery of an additional manufacturer's excise tax assessed against plaintiff, the court permitted recovery where it was shown

that the additional tax for which refund was sought was not in contemplation when the sales were made (p. 927):

“The evidence shows that the sales of rebabbitted rods were made at prices fixed by larger competitors who published, regularly, price lists. * * * An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax.

“Some of the price lists which the plaintiff sought to meet show that the particular competitor had included the excise tax in the price. There is no showing that plaintiff was aware of that fact. But even if there were, it could not be held to outweigh the positive statements that a possible excise tax *was not in contemplation* when the price was fixed.” (Italics by the court.)

While not strictly cases of *impossibility* of the tax having been included in the price of the articles sold because the sales were made both before and *after* the tax was claimed, the following decisions, where contracts of sale were made before the manufacturer learned it was subject to the excise tax and thereafter continued to sell at the same contract price, are pertinent.

Einson-Freeman Co. v. Corwin, Collector of Int. Rev. (D. C., N. Y.), 29 Fed. Supp. 98, 99; rev'd. on grounds of the Statute of Limitations, 112 Fed. (2d) 683:

“The plaintiff contends that it first learned that the government claimed the tax in February, 1933. After the plaintiff was apprised of the fact that the government claimed a tax on the jigsaw puzzles, it did not increase the price of the puzzles because of the terms of the contract of November 30, 1932. It is clear that the tax was not passed on to the vendee.”

University Distributing Co. v. United States
(D. C., Mass.), 22 Fed. Supp. 794, 799:

“It was on April 4, 1933, that the Commissioner notified the petitioner that jigsaw or cardboard die cut picture puzzles containing more than 50 pieces were considered games and ‘subject to the tax as imposed by Section 609 of the Revenue Act of 1932.’ The terms of the petitioner’s contract with its sole distributor were not changed in consequence of this ruling, and the tax here involved was not included in the price of the article sold or collected from the vendee.”

We thus contend, and we believe most reasonably and justifiably, that the requirement of Section 621(d) that no overpayment of tax shall be refunded *unless the person who paid the tax establishes that he has not included the tax in the price of the article with respect to which it was imposed or collected the amount of tax from the vendee* was, and both upon reason and the authorities must have been, satisfied by the evidence and the court’s affirmative finding thereon *that the additional tax, the refund of which is sought, was not assessed against or contemplated by the taxpayer until long after the articles with respect to which it was imposed had been sold and disposed of and “that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.”* [Finding of Fact XXII, Tr. pp. 151-152.]

By very hypothesis the additional tax could not under such circumstances have been included “in the price of the article with respect to which it was imposed” and the amount thereof was not, as found by the court, collected from the vendees later.

ANY EVIDENCE FROM THE BOOKS AND RECORDS OF THE
TAXPAYER WAS UNNECESSARY IN VIEW OF THE
EXTRINSIC CIRCUMSTANCES SHOWING THAT THE
SALES PRECEDED KNOWLEDGE OF THE TAX.

In the face of the unequivocal and favorable finding above discussed it may be idle to speculate upon the reasons for the court's adverse conclusion that the appellant had failed to establish that the additional tax was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company [Conclusion of Law VII, Tr. p. 156]. Presumably it is to be found in the opinion of the trial court [set forth in the record at Tr. pp. 95-108] wherein it is stated that the only evidence that the tax was not passed on was in the form of a stipulation that the auditor of the Pacific Company would, if called as a witness, testify that he was familiar with its books and with the prices at which tires were sold by the taxpayer and that the price of tires sold during the period August 1, 1933, to January 5, 1934, did not include any excise tax on the processed cotton contained in the tires. The court observed in its opinion:

“No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue.” [Tr. p. 108.]¹

¹It is curious to observe that the court was willing to rely on the auditor's stipulated testimony rather than the books and records as sufficient proof of other matters found to be true; as, for example, that no additional billing was made to the vendees of the Pacific Company after the tax was paid and no additional amount collected from them [*cf.* Tr. pp. 92 and 152], or that the 705,806 pounds of processed cotton on which the excise tax was assessed were part of the 782,474 pounds of cotton on which the floor stocks tax had been paid [*cf.* Tr. pp. 88 and 145.]

It is probable that the court was misled by the language of those decisions representative of the more usual situation, namely, attempts to recover refunds of taxes which were in effect and leviable at the time of the sales which gave rise to them. In such a case,¹ where the taxpayer is cognizant of the tax attaching to his proposed sale and where there is every likelihood of his having included it in his price and passed it on to his vendee, he may be put to stringent proof, from his sales records, records of cost and books of account, to establish that he has in fact absorbed the tax himself. Accordingly, we believe, the trial court may have lost sight of the fact that the additional tax in this instance *could not* in the very nature of things have been included "in the price of the article with respect to which it was imposed" for the simple reason that it had not then been demanded or assessed when the articles were sold and further because the taxpayer, as found by the court, was informed and believed that it was not liable for payment of any additional tax [Finding of Fact XXII, Tr. pp. 151-152]. That one circumstance alone, when established as it was in this case, made any further proof from the books or records of the taxpayer unnecessary and redundant unless, contrary to all the evidence, the court arbitrarily indulged the unwarranted assumption that the taxpayer included in the price of its tires a tax *which it was informed and believed it was not called upon to pay, which it did not contemplate paying*²

¹A's, for example, claims for refund of processing taxes under the Agricultural Adjustment Act following the adjudication of its unconstitutionality; *Anniston Mfg. Co. v. Davis*, *supra*.

²"that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Section 16 of the Agricultural Adjustment Act." [Finding of Fact XXII, Tr. pp. 151-152.]

and which was not demanded and which it did not pay until long after the articles "with respect to which it was imposed had been sold."

NO OBJECTION WAS RESERVED OR MADE TO THE
STIPULATED TESTIMONY.

However, forgetting for a moment the force of this argument, the trial court was still in error in concluding that the stipulated testimony of the taxpayer's auditor as to what its books would reflect was insufficient and that the plaintiff should have offered the books themselves in evidence.

As we have stated, all the evidence other than certain documentary exhibits took the form of a written stipulation [see Tr. pp. 80-92]. While there was reserved a right on the part of the government to object to the materiality or relevancy of the stipulated facts, there was no reservation of a right to object to any of the stipulated testimony upon the ground of incompetency or that it was not the best evidence.¹ The transcript reflects the following oral stipulation [Tr. pp. 189-190]:

"Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

"By stipulation of counsel for the Government, there will be no question of a foundation raised.

¹The reservation of the right to object to the *sufficiency* of the proof made is meaningless, going as it does to the quantum of the proof rather than the quality of the evidence. A cause of action can be sufficiently proved by incompetent evidence if no suitable objection thereto is made. *Paine v. Willson* (8th C.C.A.), 146 Fed. 488, 492; *American Surety Co. v. Scott* (10th C.C.A.), 63 Fed. (2d) 961, 964; 23 Corpus Juris. "Evidence," § 1783, p. 39.

However, there may be raised, either at this time, or at the time of the filing of the brief, *a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.*

"We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

* * * * *

"This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

"Is that a correct statement, Mr. Jewell—

"Mr. Jewell: *That is a correct statement.*

"The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

"Mr. Blanche: Yes, Your Honor."

That no right to object on the ground of competency of the evidence was reserved is illustrated by the companion stipulation made respecting the government's proof:

"Mr. Blanche: If the Court please, I believe that we may have a stipulation from counsel for the Government to the effect that the materiality and the relevancy of the exhibits introduced by the Government, *not as to the competency*, may be raised at any time.

"Mr. Jewell: So stipulated." [Tr. pp. 257-258.]

The objection, which made its appearance for the first time in the Government's reply brief, to bring itself within the reservation of the stipulation attempted to cloak itself in the guise of an objection to the *materiality* of the stipulated testimony rather than its competency as secondary evidence. In the reply brief it was stated:

"Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). *The Government objects to the materiality of these statements* on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor." [Tr. p. 263.]

It is thus apparent that no right to object to the stipulated testimony upon the ground that it was not the best evidence was reserved in the stipulation,¹ that no appropriate or timely objection on that ground was made at all, and that the first intimation of the objection appearing as it did in the government's trial brief left appellant without the opportunity of offering the original evidence of the books and records themselves (assuming it to have been necessary which we dispute). A subsequent motion on the part of appellant to reopen to introduce this original evidence was denied and error of the court in so ruling is made the subject of our fourth point in this brief.

¹And there was very good reason as this case fittingly illustrates: A timely objection to competency will permit the party to produce other and competent evidence. See Point IV below. An objection going to relevancy or materiality does not presuppose the power to cure it with other alternative evidence.

PROPER OBJECTION MUST BE TAKEN TO EXCLUDE
SECONDARY EVIDENCE.

The best evidence rule does not exclude secondary evidence unless objection is made upon that precise ground.

Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556, 567.

“The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to Kansas City. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded.”

Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791, 792:

“If parol evidence be received without objection, to prove the contents of a record, it is sufficient for that purpose. *Newberry v. Lee*, 3 Hill, 533. In *McMicken v. Brown*, 6 Mart. (N. S.) 86, the defendant made no objection to the introduction of the testimony, but *prayed the court to instruct the jury that it was insufficient to warrant a verdict against him*. The jury found for the plaintiff. It was held by the appellate court that *he should have objected to the admission of the evidence and that, not having done so, he was concluded by the verdict*. The judgment was affirmed.”

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299, 301;

American Surety Co. of New York v. Scott (10th C.C.A.), 63 Fed. (2d) 961, 963;

United States v. Aluminum Co. of America (D. C., N. Y.), 35 Fed. Supp. 820, 826;

Jones on Evidence (3rd Ed.), § 202, p. 291;

23 *Corpus Juris*, "Evidence," § 1783, p. 39.

This is similarly the rule in the California courts which, pursuant to Rule 43 of the Federal Rules of Civil Procedure, governs actions in the United States Court.

People v. One Ford V-8 Coach, 21 Cal. App. (2d) 445, 449; 69 Pac. (2d) 473;

Goode v. Smith, 13 Cal. 81, 84;

McCornish v. Kaufman, 43 Cal. App. 507, 510, 185 Pac. 476;

Eversdon v. Mayhew, 85 Cal. 1, 10; 21 Pac. 431;

St. Vincent's Inst. v. Davis, 129 Cal. 20, 23; 61 Pac. 477;

2 *Cal. Jur.*, § 473, p. 804;

10 *Cal. Jur.*, § 137, p. 858.

EVEN IF SECONDARY THE EVIDENCE WAS ADMISSIBLE
UNDER THE RULE RELATING TO SUMMARY EVIDENCE.

However, even had objection to the stipulated testimony of the auditor [Tr. pp. 83-88, 90-92] been reserved and timely and properly made, it would not have been well taken. It was stipulated that the witness in question, George Hubbell, was the auditor and cashier of the Pacific Company [Tr. p. 84]; that he kept its books and records [Tr. p. 85] and knew whether or not there was included in the price of the tires sold by Pacific Company during the period from August 1, 1933, to January 5, 1934, any

amount to cover any excise tax on the processed cotton contained therein (on which processed cotton a tax had already been paid under the Agricultural Adjustment Act [Tr. p. 85]), and that, in fact, there was not included in the price of the tires any amount to cover any excise tax on the weight of processed cotton therein [Tr. p. 91].

As stated in *Burton v. Driggs*, *supra*, at p. 302 of 22 L. Ed.:

“When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. I Greenl. Ev., sec. 93.”

Stephens v. United States (9th C.C.A.), 41 Fed. (2d) 440, 444; cert. den. 282 U. S. 880, 75 L. Ed. 777:

“It was not incumbent upon the prosecution to introduce the books in evidence. Such requirement would be fundamentally inconsistent with the reasons underlying the rule that qualified accountants may testify to computations, deductions, or summaries where the material facts to be shown can be ascertained only by the inspection of a large number of documents or the analysis of complicated accounts.”

United States v. Kelley (2nd C. C. A.), 105 Fed. (2d) 912, 918;

Rowland v. Boyle, 244 U. S. 106, 108, 61 L. Ed. 1022, 1023;

Jones on Evidence (3rd Ed.), § 206, p. 299;
Annotation 66 A. L. R. 1206.

This likewise is the rule of evidence in California.

Code of Civil Procedure, § 1855 (5);

People v. Dole, 122 Cal. 486, 496; 55 Pac. 581;

Pacific Paving Co. v. Gallett, 137 Cal. 174, 176;
69 Pac. 985;

Globe Mfg. Co. v. Harvey, 185 Cal. 255, 261; 196
Pac. 261;

Kinney v. Maryland Cas. Co., 15 Cal. App. 571,
574, 115 Pac. 456.

THE STIPULATED TESTIMONY WAS IN FACT PRIMARY EVIDENCE.

But was the stipulated testimony of Mr. Hubbell in fact secondary rather than primary evidence? He was the auditor and cashier of the Pacific Goodrich Rubber Company and testified from his own knowledge that the price of the tires sold during the period in question did not include any amount to cover any excise tax on the processed cotton contained therein [Tr. p. 91]. Who was in a better position to know this fact and to testify to it than the auditor and cashier? And is the assumption (for it is no more than an assumption of the Government's counsel and the trial court) warranted that the inclusion or noninclusion of this tax (which had not yet been assessed or demanded) in the price of the tires sold could only have been proved by the books and records of the company? We think not. Compare *R. Hoc & Co. v. Commissioner of Internal Revenue* (2d C.C.A.), 30 Fed. (2d) 630, where petitioner was called upon to establish that certain moneys paid to it by the government on reconversion of its plant from wartime to peacetime operation was no more than the actual cost thereof to the company and hence was improperly included as taxable income.

Kelly, the vice president who was in charge of petitioner's business during the reconstruction period, testified that he knew that the losses and expenses incident to the reconversion were greater than the \$324,000 which was paid by the Government. It was held to be error for the Commissioner and the Board of Tax Appeals to have stricken this testimony "upon the ground that the books are the best evidence and that it rests entirely in the witness' opinion," page 634:

"The objection that the books were the best evidence was clearly insufficient, for they were not necessary at all as a part of the taxpayer's proof. * * * The testimony of Kelly was not secondary evidence. *Central Commercial Co. v. Jones-Dusenbury Co.* (C.C.A.), 251 F. 13. If it was not sufficiently specific, the objection should have been taken for that reason, so that the taxpayer could elaborate it further. *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299. The witness was a person who, more than any one else, knew the facts and could estimate the expense and loss. We cannot say that his uncontradicted statement that there were expenses greater than the payment made should go for nothing, * * *"

In *Central Commercial Co. v. Jones-Dusenbury Co.* (7th C.C.A.), 251 Fed. 13, the court stated, p. 16:

"As appears from the contract, defendant contracted with plaintiff for the product of A. E. Turner & Co., and only that. The defense interposed was that plaintiff undertook to work off upon defendant rosin of other manufacturers. To refute this charge plaintiff, among other evidence, introduced the testimony of the two alleged best qualified witnesses, who swore unqualifiedly to the statement that no rosin but that manufactured by Turner & Co. within the

conditions named in the contract was delivered by plaintiff to defendant, nor was any other included in the rosin involved in this suit. * * *

“Defendant now raises the point that plaintiff had better evidence as to the rosin manufactured by Turner & Co., viz. a certain book alleged to contain records of the daily production and all other rosin manufactured by Turner & Co. during the contract period, which, defendant insists, should have been introduced in evidence on the trial as being the best evidence of such production.

“The contention is, to say the least, novel. The evidence introduced was in no sense secondary. It was primary in its nature. There was no denial of it. It may be that defendant could have found in the production records some better data for cross-examination, or evidence more conclusive to its counsel’s mind, but the proposition that the rule requiring the production of the best evidence applies to circumstances and conditions such as here prevail does not commend itself to us.”

And in cases involving the identical question here in issue, whether the incidence of a tax has been passed on, oral evidence has been held competent and sufficient.

C. B. Cones & Son Mfg. Co. v. United States (7th C.C.A.), 123 Fed. (2d) 530, 533:

“Its general manager testified that the vendees would not stand for the addition of the tax and that it was not included in any other sales.”

Marchand Co. v. Higgins, Collector of Internal Revenue (D. C., N. Y.), 36 Fed. Supp. 792, 794:

“There is a condition precedent to recovery which is imposed by statute on the plaintiff. Section 621(d)

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“There is a condition precedent to recovery which is imposed by statute on the plaintiff. Section 621(d)

of the Revenue Act of 1932, 26 U. S. C. A. Int. Rev. Code, § 3443(d), places a burden on the taxpayer who seeks to recover manufacturer's excise taxes to show that the tax has not been passed on to the trade. Testimony to this effect was given by Mr. Brooks, a witness for the plaintiff. The defendant interposed no contradictory evidence on this score. I hold that the plaintiff sustained the burden of proof imposed by statute. *Biermann v. Shea*, D. C., 28 F. Supp. 213."

Duradene Co. v. Magruder, Collector of Internal Revenue (D. C., Md.), 21 Fed. Supp. 426, 431; aff'd. 95 Fed. (2d) 999:

"As to this, I find from the testimony that the plaintiff did not pass on the tax but itself sustained its burden. This is the categorical statement of the principal officer of the plaintiff not shaken by cross-examination or other circumstances."

Biermann v. Shea (D. C., N. Y.), 28 Fed. Supp. 213, 216:

"The presumption relied upon by the government was rebutted by the plaintiff by uncontradicted evidence that he absorbed or bore the burden of the tax."

Ney v. United States (D. C., Va.), 33 Fed. Supp. 554, 557:

"The fact remains that we have the testimony of a very considerable number of credible witnesses employed in and exercising a certain amount of authority in the various departments of the plaintiffs' store and each of these witnesses has testified with positiveness that they remember the occasion of the imposition of this tax because of the duties imposed upon them in ascertaining the amount thereof, and who testify with equal positiveness that there was no increase in prices of any article as a result of this tax or following it

and that the tax was not passed on to the consumer in the shape of any increase in prices or otherwise; that the sales policy of the store and its prices were in no way altered in any respect; and there is no contradiction of these statements whatsoever and no evidence introduced which tends in any way to discredit them. Under the circumstances, the court would have to adopt the arbitrary attitude of disbelieving these witnesses, which it does not do, and where there is no evidence to justify such disbelief, in order to hold that there has been no proof on the part of the plaintiffs of the claim which they have made, namely, that they paid this tax themselves and in no way passed any part of it on to the consumer."

Con-Rod Exchange, Inc. v. Henricksen, 28 Fed. Supp. 924, 927:

"An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax."

Summarizing then this second point of our brief, we urge error on the part of the trial court in concluding that appellant failed to establish that the additional tax was not passed on, first and principally because in the very nature of things consistent with the court's Finding XXII the tax *could not* have been included in the price of the articles with respect to which it was imposed; second, if this erroneous conclusion is based upon the fact that the stipulated testimony of the auditor was not the best evidence and that the books of Pacific Company should have been introduced, the court doubly erred because no appropriate objection to the stipulated testimony was reserved or made and in any event such evidence under the authorities is unobjectionable and sufficient.

III.

A Transferee of "the Person Who Paid the Tax" May Establish the Facts Required To Be Shown by Section 621(d) of the 1932 Revenue Act.

Closely related to both the first and second points argued in this brief was the third and final ground, as reflected in the conclusions of the trial court, for its judgment adverse to appellant. We have shown above that the circumstances under which appellant acquired its right to pursue this action for recovery of the additional manufacturer's excise tax, which the trial court found to have been wrongfully and illegally collected, was not such as to fall within the prohibition of R. S. § 3477 and that hence, as successor in interest of the taxpayer, appellant could properly maintain this action for refund; we have similarly shown that in view of the facts found by the court appellant must necessarily have established that the additional tax was not included "in the price of the article with respect to which it was imposed" (Section 621(d) of the 1932 Revenue Act) and the court itself affirmatively found that the taxpayer had not "collected the amount of the tax from the vendee" later [Section 621(d); Finding XXII, Tr. p. 152]. The trial court, however, in its Conclusion of Law VI [Tr. p. 156] concluded that under Section 621(d) only "the person who paid the tax" can establish the facts required to be shown, namely, that the tax had not been passed on, and that appellant was not "the person who paid the tax."

At first blush this legal nicety is somewhat disconcerting as it would effectively prevent every transferee by operation of law from maintaining action for the recovery of manufacturer's excise taxes notwithstanding the undisputed fact, concurred in by the Bureau of Internal Revenue

itself (G. C. M. 21058, 1939-1 C. B. part I, p. 280) that an assignee by operation of law is not within the prohibition of R. S. § 3477. We cannot bring ourselves to believe that this court will concur in so literal and narrow a construction of Section 621(d) as to prohibit recovery of illegally collected or erroneously paid manufacturer's excise taxes by receivers, by trustees in bankruptcy, by executors, administrators, or by any successor in interest through operation of law simply because Section 621(d) is so worded as to lend itself to the possible interpretation that "the person who paid the tax" must *himself* establish that the tax has not been included in the price of the article sold. The purpose to be effected by the limitation of Section 621(d) we have mentioned above (p. 35), and clearly both Congressional intent and the Bureau of Internal Revenue¹ will be satisfied *if it is established* that the person who paid the tax has not included the tax in the price of the article with respect to which it was imposed or that he has not collected the amount of the tax from the vendee, and this irrespective of from whom the requisite proof may emanate.

Though the exact question has not been previously decided we are not without the aid of valuable precedents under analogous statutes.

Section 902 of the Revenue Act of 1936 (7 U.S.C.A. § 644) makes provision of refunds of taxes paid under the Agricultural Adjustment Act; it provides: "No refund shall be made or allowed, in pursuance of court decision or otherwise, of any amount paid by or collected from any claimant as tax under this chapter, unless *the claimant*

¹See discussion below of G. C. M. 21058, reported in 1939-1 C. B. part I, p. 280 and note that this ground of the decision was not urged by the government here but was the brain child of the trial court itself.

establishes * * * (a) That *he* bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly.”

Section 903 of this Act (7 U.S.C.A. § 645) provides “No refund shall be made or allowed of any amount paid by or collected from *any person* as tax * * * unless a claim for refund has been filed by *such person*, etc.”

It will be noted that these limitations, like that of Section 621(d), purport to require the *personal* proof and *personal* claim of the taxpayer, but it has nevertheless been held that an assignee by operation of law can recover thereunder upon establishing the requisite proof.

In *Roomberg v. United States*, 40 Fed. Supp. 621, the identical question was raised where the sole stockholder of a dissolved corporation sought recovery of floor stocks taxes paid under the Agricultural Adjustment Act. The government contended that:

“under Sections 902 and 903 refunds can be made only to the person paying the tax, and that the tax was paid by the corporation and not by Roomberg individually.”

The court, as noted above, denied the motion to dismiss and held that inasmuch as Roomberg was the sole beneficial owner of the assets of the corporation he was in effect the taxpayer.

In G. C. M. 21058, 1939-1 C. B. part I, p. 280, J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, rendered an opinion as to whether or not an assignee by operation of law, in that case a reorganized corporation, could recover processing taxes paid by its pre-

decessor in interest. After observing that an assignee by operation of law did not fall within the prohibition of R. S. § 3477, the opinion goes on to state, page 281:

“The question remains as to whether a proper claim for refund has been filed in this case.

“Section 903 of the Revenue Act of 1936 provides that ‘No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person * * *.’ *The person who paid the tax in this case was the M Company. However, that company, if still in existence, has neither interest nor title to the claim for refund. The N Company ‘stands in the shoes’ of the M Company, having acquired all right, title, and interest in the claim against the Government. In National Foods, Inc., v. United States (82 Ct. Cl., 627, 13 Fed. Supp. 364, certiorari denied October 12, 1936) it was held that the assignor of a claim against the Government (which claim had been transferred by operation of law) was not the proper party to maintain a suit to recover on the claim. It is held in the present case that the N Company is the proper party to file the refund claim.*”

This manifestly sound opinion of the Bureau adheres to the doctrine of those decisions holding that the term “taxpayer” or “person paying the tax” should be given a liberal interpretation to include the transferee of a taxpayer. The language of the Second Circuit Court of Appeals in *Olsen v. Helvering*, 88 Fed. (2d) 650, might well be paraphrased to fit this case. It was there held that a notice of deficiency which under Section 272(a) of the

Revenue Act of 1928 (26 U.S.C.A. § 272), the Commissioner was required to address to the "taxpayer" was sufficient though addressed to the decedent rather than to his administrator, the technical "taxpayer." Said the court, page 651:

*"This being true, we are unwilling to construe even a tax statute in the archaic spirit necessary to defeat this levy; the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough."*¹

Burnet, Commissioner of Internal Revenue v. San Joaquin Fruit & Investment Co., decided by this court in 52 Fed. (2d) 123, similarly held that notices of deficiency mailed to a dissolved corporation, San Joaquin Fruit Company, were not insufficient as against its transferee and successor in interest, San Joaquin Fruit & Investment Company. As transferee and in fact the sole stockholder of the dissolved corporation (see p. 125), this court held that under Section 280 of the Revenue Act of 1926 (26 U.S.C.A., §1069(a)(1)) it would be liable for the tax liabilities of its predecessor in interest and as such was in fact the real as well as the apparent taxpayer, and concluded, page 128:

"In the instant case the transferee, the taxpayer in fact and in law, received the notice of deficiency in the tax of the transferee's predecessor. The transferee's own pleadings clearly show that such notice

¹By like token this court might well hold that it was unwilling to construe Section 621(d) in the archaic spirit necessary to defeat this refund; the limitation is only to avoid unjust enrichment and to establish that the tax has not been passed on; anything that establishes this unequivocally is good enough whether it be established by "the person who paid the tax" or by others.

conveyed the necessary information; namely, a deficiency in the tax, for which the transferee was sought to be held liable, and was in fact and in law liable. The mere failure so to designate the transferee is not fatal, nor does it deprive the Board of Tax Appeals of its jurisdiction over the proceedings and to determine the issues there involved.

“In view of the Supreme Court’s liberal attitude toward this statute as a remedial measure, we do not feel inclined to deny the Government its right to collect its taxes merely because it failed to label the transferee as such.”

United States v. Updike, 281 U. S. 489, 74 L. Ed. 984, presented the same question in the guise of the application of the statute of limitations. Said the court, page 494:

“Indeed, when used to connote payment of a tax, it puts no undue strain upon the word ‘taxpayer’ to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.”

Of similar import is *United States v. Markowitz* (D. C., Cal.), 34 Fed. Supp. 827, where the court held, page 830:

“There is no reasonable basis to assume that Congress, in using the word ‘Taxpayer,’ intended to exclude the transferee of the assets of a taxpayer and liable for the tax as such, from the provisions of a portion of the statute, thereby creating a shorter statutory period for the commencement of an action for the tax against him than is provided for the commencement of the action against the taxpayer himself.”

In *Phillips v. Commissioner of Internal Revenue* (2d C.C.A.), 42 Fed. (2d) 177, affirmed 283 U. S. 589, 75 L. Ed. 1289, the question was presented a little differently. Delinquent corporate income taxes of a dissolved corporation were assessed against Phillips, one of its eleven stockholders as "transferee" under Section 280 of the 1926 Revenue Act (26 U.S.C.A. § 311). When he sought to appeal from the decision of the Board of Tax Appeals it was urged that inasmuch as the right of review given under Section 1001 of the Revenue Act of 1926 (*cf.* 26 U.S.C.A. § 1142) is restricted only to the Commissioner or the "taxpayer" and petitioner was not the taxpayer, the court had no jurisdiction. In disposing of this contention the court said, page 179:

"The precise point now under consideration was discussed in *Routzahn v. Tyroler*, 36 F. (2d) 208 (CCA. 6), and we agree with the view there expressed that the statutory definition of 'taxpayer' (26 USCA § 1262) is not seriously inaccurate as applied to a transferee. This view finds added support in the language of the Supreme Court in *United States v. Updike*, 50 S. Ct. 367, 369, 74 L. Ed. 984."

To the same effect see:

Routzahn v. Tyroler (6th C.C.A.), 36 Fed. (2d) 208; cert. den. 281 U. S. 734, 74 L. Ed. 1149;

Commissioner of Internal Revenue v. New York Trust Co. (2d C.C.A.), 54 Fed. (2d) 463, 465; cert. den. 285 U. S. 556, 76 L. Ed. 945;

White v. Hopkins (5th C.C.A.), 51 Fed. (2d) 159, 162-163;

Skaneateles Paper Co., 29 B. T. A. 150, 154.

Without the quotation from or citation of further authorities it is apparent that such phrases in the Revenue Acts as "taxpayer," "person subject to the tax" or "person who paid the tax" are not, unless reason and the context so require, inelastic terms but include and properly include the real party in interest whether or not that person falls within the technical designation of "the person who paid the tax."

THE PHRASE "PERSON WHO PAID THE TAX" IN SECTION 621(d) HAS BEEN HELD TO INCLUDE OTHERS THAN THE ACTUAL TAXPAYING ENTITY.

It is not without considerable interest to note that set in another context the phrase "the person who paid the tax" as contained in Section 621(d) of the 1932 Revenue Act has been construed to include not only the technical taxpayer but also its corporate affiliate. It will be recalled that the section prevents the recovery of a refund unless "*the person who paid the tax* establishes * * * that *he* has not included the tax in the price of the article with respect to which it was imposed."

In *Bourjois, Inc. v. McGowan, Collector of Internal Revenue* (D. C., N. Y.), 12 Fed. Supp. 787, affirmed 85 Fed. (2d) 510, action was brought to recover additional manufacturer's excise taxes collected from plaintiff. Plaintiff utilized wholly owned subsidiary sales corporations through whom it distributed its products and while plaintiff's sales price to its subsidiaries did not include any additional amount for the tax, the sales corporations did collect the tax from their purchasers. In short, while

“the person who paid the tax” did not include the tax in its prices its subsidiaries did. In dismissing the action the court stated, page 793:

“It is to be assumed, therefore, that the prices now charged by the sales corporations include an amount equal to the tax computed on the selling price of the sales corporations, which price has been determined to be the selling price of the plaintiff, the manufacturer. * * * Bourjois, Inc., itself has not collected the additional tax. The sales corporations have. *The effect is the same as though plaintiff had collected it.*

“Section 621(d) of the Revenue Act of 1932, 26 U.S.C.A. §1481 note, provides: ‘No overpayment of tax * * * shall * * * be refunded * * * unless the person who paid the tax establishes * * * (1) that he has not included the tax in the price of the article, * * * or (2) that he has repaid the amount of the tax to the ultimate purchaser.’ The purchaser having paid the tax, the plaintiff sustained no loss. *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.”

In *Campana Corporation v. Harrison* (7th C.C.A.), *supra*, where sales were made through a subsidiary selling corporation and the parent manufacturing company paid the manufacturer’s excise tax for the refund of which that action was brought, it was necessary for the court to find that neither the taxpayer *nor the selling corporation* passed on the tax, page 408:

“We conclude therefore that there is evidence showing that neither the taxpayer nor the Sales Company passed on the additional tax of \$3,121.72.”

And see to the same general effect:

Albrecht & Son v. Landy, Collector of Internal Revenue (8th C.C.A.), 114 Fed. (2d) 202;

Ayer Co. v. United States (Court of Claims), 38 Fed. Supp. 284;

Andrew Jergens Co. v. Connor (D. C., Ohio), 31 Fed. Supp. 61.

If thus the affiliated selling corporation may be treated as “the person who paid the tax” within the meaning of that phrase in Section 621(d) in determining whether the incidence of the tax has been passed to the ultimate buyer no different connotation can be given the phrase when the parent and successor in interest seeks to establish under the same section that the tax has not been included in the price of the articles sold. We reiterate that to hold otherwise as did the trial court in its Conclusion of Law VI [Tr. p. 156] would effectively preclude the refund or recovery of illegally collected manufacturer’s excise taxes by trustees in bankruptcy, receivers, executors, administrators or any such similar successors in interest by operation of law.

As “the person who paid the tax” is now dissolved and no longer in being and hence not available as a witness for the appellant, the words of Mr. Chief Justice Hughes in *Anniston Mfg. Co. v. Davis, Collector of Internal Revenue*, 301 U. S. 337, 352, 81 L. Ed. 1143, 1153, are not inappropriate:

“When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be in-

herently impossible. as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determinations."

THAT THE ADDITIONAL TAX WAS NOT IN FACT PASSED ON WAS IN FACT ESTABLISHED BY "THE PERSON WHO PAID THE TAX."

Let us, however, approach the matter from another point of view for a moment. Is it in fact true, assuming our initial premise that appellant as successor in interest of the taxpayer is not prohibited from maintaining this action, that "the person who paid the tax" has not in truth established the facts required by Section 621(d) to be established? The "person who paid the tax" in this instance is, or was, a corporation which can act only through its officers and agents. George Hubbell, whose testimony was stipulated, testified that he "was an agent and employee of Pacific Goodrich Rubber Company, to wit, the cashier and/or auditor of said company" [Tr. p. 84]. He also testified from his knowledge of the books of that company and to the facts that those books and records would disclose. While the witness was not at the time of trial an agent and employee of the Pacific Company, the taxpayer, because of its dissolution several years previously, the net result of the evidence adduced was identically the same as though the Pacific Company itself had then been in existence and Mr. Hubbell, its auditor and cashier, had testified as agent of the corporate taxpayer to the end of establishing the facts required by Section 621(d), to wit, that the additional tax had not been included in the price of the articles with respect to which it was imposed.

If, as the trial court concluded [Conclusion of Law II, Tr. p. 154], the refund of this additional manufacturer's excise tax, which was "erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest," can be prosecuted under the equitable remedy of money had and received,¹ it argues strange for a court of equity to deny relief upon the sole ground that "the person who paid the tax" had not *itself* established the necessary facts when those facts were, by hypothesis, established by one of its own officers testifying from its own records.

SECTION 621(d) RELATES ONLY TO THE MATTER OF REQUISITE PROOF; THE RIGHT OF RECOVERY FROM THE GOVERNMENT IS FOUND IN OTHER STATUTES WHICH DO NOT LIMIT REFUNDS ONLY TO THE PERSON PAYING THE TAX.

Not to be overlooked is the fact that Section 621(d) goes only to the requisite proof to be made before a refund can be had, it does not confer the right to a refund of taxes erroneously or illegally collected. The *right of recovery* and the authority of the Commissioner to refund such erroneously or illegally collected taxes is to be found in Revised Stats. § 3220.² I. R. C. § 3770(a)(1) (26

¹Thus in its opinion the trial court stated:

"We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor, v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350." [Tr. p. 101.]

²See *Dodge v. Osborn*, 240 U. S. 118, 60 L. Ed. 557; *Haskins Bros. & Co. v. Morgenthau* (U. S. Ct. of App.), 85 Fed. (2d) 677, 684, Cert. denied 299 U. S. 588, 81 L. Ed. 433; *White v. Hopkins* (5th C.C.A.), 51 Fed. (2d) 159, 161; *Karno-Smith Co. v. Maloney, Collector, etc.* (3rd C.C.A.), 112 Fed. (2d) 690, 692.

U.S.C.A. § 3770(a)(1)) which, it will be noted, does not restrict the Commissioner of Internal Revenue to the making of refunds only to the taxpayer¹ but in general terms authorizes the Commissioner "to remit, refund and pay back all taxes erroneously or illegally assessed or collected." There being no limitation as to the particular person to whom refund is to be made, it is implicit in the statute that it shall be made to the person lawfully entitled thereto, in this instance not the dissolved taxpayer but its assignee and successor in interest.

Going as it does then only to the method of proof and not to the right of recovery, we reiterate, first, that the requirements of Section 621(d) are satisfied if *it is established* (and not necessarily only by "the person paying the tax") that "the person paying the tax" has not included the tax in the price of the article with respect to which it was imposed; second, that the phrase "the person who paid the tax" includes and has been interpreted to include transferees by operation of law and closely held corporate affiliates; and, third, that in reality it was in fact "the person who paid the tax" who established by testimony of its agent and employee the necessary facts required by Section 621(d).

¹As is the case with respect to refunds of income, war-profits or excess profits taxes. See I. R. C. § 322(a) which authorizes refunds "to the taxpayer."

IV.

**In Refusing Appellant the Right to Reopen Its Case
to Introduce Further Proof the Trial Court
Abused Its Discretion.**

The decision from which this appeal has been prosecuted was adverse to appellant upon three distinct grounds: that appellant acquired its right to the refund by assignment from the Pacific Company and that the assignments were void under Rev. Stats. § 3477; that appellant had not sufficiently established that the additional tax was not passed on to the vendees of Pacific Company; and that in any event Pacific Company as “the person who paid the tax” was the only one under the terms of the statute who could establish that the tax had not in fact been included in the price of the tires with respect to which it was imposed.

Not one of these grounds of decision was urged by either the Commissioner of Internal Revenue when the respective claims for refund were rejected or by the Government at or before the trial or at any time until after its conclusion. The asserted invalidity of the assignments and the limited construction placed upon Section 621(d) of the 1932 Revenue Act were in fact points not advanced by the appellee at all and appeared for the first time in the written opinion of the trial court.

The conclusion of the court that appellant had failed to establish that the additional tax had not been passed on to the vendees of the Pacific Company within the requirements of Section 621(d) of the Revenue Act of 1932, was apparently bottomed upon the fact that “no

books of account or sales records were produced and no explanation for their nonproduction was made at the hearing” [Opinion of the trial judge, Tr. p. 108].

The testimony as to whether the Pacific Company had or had not included the additional tax in the price of the tires it had previously sold with respect to which sales the additional tax was subsequently assessed (a supposition manifestly absurd on the face of it) took the form of a written stipulation as to what the auditor and cashier of the taxpayer, who kept its books and records and knew their contents, would testify if called as a witness [Tr. pp. 83-86, 90-92]. No right was reserved in the stipulation or elsewhere to object to the competency of this testimony as secondary or not the best evidence and no proper objection on that ground was in fact made.

Not until it filed its reply brief [Tr. p. 263] following the conclusion of the trial [Tr. p. 261] was the point raised that this stipulated testimony was not material because “not the best evidence to show that the tax was not passed.” The ruling of the court, if such it may be termed, upon this objection was made for the first time in its opinion¹ [“Conclusion of the Court on the Merits of the Action,” Tr. pp. 95-108] rendered December 31, 1940.

Shortly thereafter and on February 3, 1941, some six months before the making and entry of judgment in the cause [Tr. p. 158], appellant moved to reopen the case to admit further proof [Tr. pp. 110-135]. It was urged as a first ground therefor:

“that no right was reserved in the defendant to object to the testimony set forth in the stipulation of facts

¹Because the ruling of the court on the objection there first appears, the opinion was included in the transcript of the record.

on the ground that it was not the best evidence and that plaintiff and its counsel were not aware of any misunderstanding or basis for misunderstanding of counsel with reference thereto and did not anticipate that said stipulation made in open court would or could be construed by the court to permit the defendant to object to such testimony on the ground that it was not the best evidence." [Tr. p. 112.]

In support of the motion was an affidavit, amongst others, of George Hubbell that he could and would show from the books of account and records of Pacific Company, its invoices, inventory records, manufacturing records, sales records and cost records that his testimony as set forth in the Stipulation of Facts filed in the cause was in all respects true and correct and from which records he could show that the tax was not passed on to the vendees of Pacific Company [Tr. pp. 129-130]. The court on April 15, 1941, denied the motion to reopen to admit further proof [Tr. pp. 139-140] and on August 4, 1941, judgment was entered in favor of the Government.

In view of the fact that it was not until after the conclusion of the trial, at a time when appellant was precluded from remedying the supposed defect, that objection was first taken to the testimony in support of appellant's case, it was manifest error on the part of the trial court to refuse appellant the right to reopen to introduce the books and records themselves if these constituted the only source of evidence the trial court was willing to consider.

When the trial judge after submission of a case concludes that material and necessary testimony which has been offered is not competent he should reopen the case of his own motion to admit further proof.

Paine v. St. Paul Union Stockyards Co. (8th C.C.A.), 28 Fed. (2d) 463, where in reversing the trial court it was said, page 467:

“Here the only evidence pointed to a contrary conclusion than that reached. To some of it when offered there was no objection. If that evidence was not competent, it was nevertheless received and the case submitted with that evidence in. It was vital to the defense. If after the submission of the case and when it was under advisement the trial judge concluded that it was not competent, on his own motion he should have reopened the case to give the defendants an opportunity to present competent evidence. *They would have had that opportunity had this testimony been excluded at the trial. To exclude it after the conclusion of the trial, when there was no longer any opportunity to supply the omission, was to make possible a serious miscarriage of justice, and was error.*”

Amsinck & Co. v. Springfield Grocer Co. (8th C.C.A.), 7 Fed. (2d) 855, 858:

“If it was not a final judgment, then the case remained on the docket, and the court would have the power at the next term, in the exercise of its judicial discretion, to reopen the case for the purpose of receiving newly discovered evidence, or any other purpose consonant with justice and a correct decision, and unless there was clear abuse of such discretion the appellate court will not interfere.”

In *Hormel v. Helvering, Commissioner of Int. Rev.*, 312 U. S. 552, 85 L. Ed. 1037, the Supreme Court, in remanding a cause to the Board of Tax Appeals to take

further evidence upon the question at issue, stated, page 557 (p. 1041 of 85 L. Ed.):

“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.
* * * Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.”

Arkwright Mills v. Commissioner of Int. Rev.
(4th C. C. A.).¹

Appeal was taken from the Processing Tax Board of Review for error on the part of the Board in rejecting plaintiff's offered testimony to prove that the increased margin of profit it enjoyed in the tax period was attributable to a greater demand for its cotton goods than to the passing on of the processing tax. In reversing and remanding the cause, the court said:

“The evidence was rejected simply on the ground that in the judgment of the Board it was not the type of proof required by the statute to rebut the statutory presumption. In this action there was error. The statute permits the use of any evidence which is pertinent to the questions to be determined. The evidence offered was pertinent and possessed of probative force, and would have justified a finding in the claimant's favor.”

The general rule with reference to the reopening of a case to admit of further proof is thus stated in 64 Corpus Juris. “Trial,” § 179, page 158:

“A motion to reopen a case for the purpose of introducing further evidence in the cause is addressed

¹This decision has not yet appeared in the reports and the correct citation will be given in our reply brief. The decision can be found in 1941 Prentice-Hall, Federal Tax Service, Volume IV, ¶61,036.

to the sound discretion of the court, the exercise of which is not subject to review, unless there has been an abuse thereof. *The discretion is to be liberally exercised in behalf of allowing the whole case to be presented, for the best advancement of the ends of justice.* While the exercise of the court's discretion should not be hampered by unreasonable conditions, such discretion is judicial and not arbitrary. It should be reasonably exercised so as not to injure the opposite party through surprise or otherwise, *and so as not to deprive either party of the opportunity to introduce material evidence."*

While we by no means concede or even imply that the evidence which was adduced was either insufficient or incompetent satisfactorily to establish that the additional tax had not been added to the price of the tires with respect to the sale of which the extra tax was assessed, we do urge that to the extent the trial court's adverse decision was predicated upon the insufficiency or incompetency of the evidence to establish this fact it erred in not permitting appellant to further prove, if necessary, this vital fact from the books and records themselves if those constituted the only evidence the trial court was willing to entertain.

Conclusion.

In conclusion, it is the appellant's earnest contention that the judgment of the trial court in this cause should be reversed for the errors to which we have adverted: that appellant was not prohibited by § 3477 of the Revised Statutes from prosecuting this action; that it was necessarily and sufficiently established that the additional manufacturer's excise tax was not, and in fact could not have

been, included in the price of the tires upon the sales of which the extra tax was subsequently assessed and collected; and, that if this fact was sufficiently established, it matters not that it was proved by appellant rather than by the dissolved taxpayer itself. Finally, that if the trial court felt that the original records were necessary to satisfy it that the amount of the tax had not been added to the price of the tires sold, it erred in refusing appellant the opportunity to produce this other evidence.

When it is recalled that in the language of the trial court itself [Conclusion of Law II, Tr. p. 154] the appellee has “erroneously, illegally and unjustly demanded and collected” \$16,450.39 from appellant’s wholly owned and now dissolved subsidiary, the tenuous grounds upon which the judgment for the government was based crumble under the weight of reason, the authorities and the equities, all of which unanimously demand that the judgment of dismissal be reversed.

Respectfully submitted,

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APPENDIX.

Section 602, Revenue Act of 1932 (26 U. S. C. A. §3400: "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

"(1) Tires wholly or in part of rubber, $2\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary."

Section 621(d), Revenue Act of 1932 (26 U. S. C. A. §3343(d)): "No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

Section 626, Revenue Act of 1932 (26 U. S. C. A. §3448):

"(a) Every person liable for any tax imposed by this chapter other than taxes on importation shall make monthly returns under oath in duplicate and pay the taxes imposed by this chapter to the collector for the district in which is located his principal place of business or, if he has no principal place of business in the United States,

then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

“(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid.”

Act May 12, 1933, Chapter 25, Title I, §16 (7 U. S. C. A. §616(a)): “Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

“(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. * * *

“(2) Whenever the processing tax is wholly terminated, (A) there shall be refunded or credited in the case of a person holding such stocks with respect to which a tax under this chapter has been paid, or (B) there shall be credited or abated in the case of a person holding such stocks with respect to which a tax under this chapter is payable, where such person is the processor liable for the

payment of such tax, or (C) there shall be refunded or credited (but not before the tax has been paid) in the case of a person holding such stocks with respect to which a tax under this chapter is payable, where such person is not the processor liable for the payment of such tax, a sum in an amount equivalent to the processing tax which would have been payable with respect to the commodity from which processed if the processing had occurred on such date:"

Act May 12, 1933, Chapter 25, Title I, §9(a) (7 U. S. C. A. §609(a)): "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 608 of this title are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning to the marketing year therefor next following the date of such proclamation; * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all

payments authorized under section 608 of this title which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided, That upon any article upon which a manufacturers' sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished articles less the weight of the processed cotton contained therein on which a processing tax has been paid.*"

Revised Statutes §3477, 31 U. S. C. A. §203:

"§203. Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, except as provided in section 204 of this title, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assign-

ment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors."

Section 902, Revenue Act of 1936 (7 U. S. C. A. §644):

"No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under this chapter, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 648 of this title, as the case may be—

"(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of this chapter, or in the price of any article processed from any commodity with respect to which a tax was imposed under this chapter, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof;"

Section 903, Revenue Act of 1936 (7 U. S. C. A. §645):

“No refund shall be made or allowed of any amount paid by or collected from any person as tax under this chapter unless, after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under this chapter, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.”

Revised Statutes §3220 (26 U. S. C. A. §3770(a)(1)):

“§3770(a)(1): Except as otherwise provided by law in the case of income, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.”